Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

WEI YE, HAO WANG, DOES A, B, C, D, E, F,
and others similarly situated,

Petitioners,

v.

JIANG ZEMIN AND FALUN GONG CONTROL OFFICE,
a/k/a OFFICE 610,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a former head of state able to claim head-of-state immunity?

2. Does head-of-state immunity protect a former head of state for his or her private acts that are unofficial or for conduct that is *ultra vires*, beyond the lawful authority of the sovereign state and in violation of *jus cogens* standards of international law?

3. To what extent are U.S. courts obliged to accept suggestions of immunity provided by the Executive Branch that go beyond the factual question of whether or not a prospective defendant does or does not currently hold the position of head of a foreign state, or is otherwise immune from judicial process as an eligible diplomat?

LIST OF PARTIES

The parties below are listed in the caption. In addition, thirty-nine members of the United States Congress appeared as *amicus curiae* in support of petitioners. The United States Government appeared as *amicus curiae* in support of Respondent, Jiang Zemin.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Wei Ye v. Jiang Zemin,* 383 F.3d 620 (7th Cir. 2004). The Seventh Circuit affirmed the September 12, 2003 decision of the United States District Court for the Northern District of Illinois, reported at *Plaintiffs A,B,C,D,E,F v. Jiang Zemin*, 282 F. Supp. 2d 875 (N.D.Ill. 2003), as well as the October 6, 2003 decision of the same court on a motion for reconsideration of the same case, docketed on October 15, 2003. *See* Appendices A-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under Title 28 United State Code § 1254(1). The time for filing the enclosed petition has been extended to and including February 5, 2005, by order of the Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 28 United States Code § 1350, Alien Tort Claim Act and the Torture Victims Protection Act; Title 28 United States Code, § 1602 *et seq*., Foreign Sovereign Immunities Act of 1976.

STATEMENT OF THE CASE

Falun Gong is an eastern form of spiritual belief and religious practice that resembles western religions in that it aims to teach people to become more compassionate and better persons. Based on the spiritual and moral principles of compassion, truthfulness and forbearance, the practice of Falun Gong flourished in China from its introduction to the public in May 1992 to the beginning of the persecution of Falun Gong in 1999.

This case concerns the persecution campaign Respondent Jiang designed, organized and carried out to eliminate the practice of Falun Gong in China. When the persecution first began in China in July 1999, many believed the campaign to be another mass movement orchestrated and backed by the Communist Party leadership as a whole. However, as plaintiffs

allege in this case, an abundance of evidence has emerged showing that Respondent Jiang not only formulated the policy of eradicating Falun Gong himself, but also, "by unleashing a Mao-style movement, Jiang forced senior cadres to pledge allegiance to hi[m]."[1] Like Saddam Hussein, the Respondent had the power to hijack government and party officials of the People's Republic of China, but not the legitimate authority.[2] As a direct result, the campaign of persecution occurred outside of the legitimate and officially mandated functions and operations of the government of the People's Republic of China and in direct violation of several provisions of the Chinese Constitution and Chinese law.

The extent and severity of the religious persecution of Falun Gong throughout China have been confirmed and extensively documented by the U.S. Government in its Country Reports on Human Rights Practices, and most especially in its Annual Reports on International Religious Freedom, as well as in reports issued by non-governmental human rights monitoring groups such as Amnesty International and Human Rights Watch. For example, the United States Department of State Country Reports on Human Rights: China (Feb. 25, 2004), states that China in 2003 perpetrated widespread abuses and violations against Falun Gong practitioners – all geared to both suppress and totally eradicate the presence of Falun Gong in China.

Noting that the Communist Party continued its crackdown against the Falun Gong spiritual group, the report enumerates just what this has meant for practitioners of Falun Gong: thousands of practitioners remained incarcerated in prisons, extra-judicial reeducation-through-labor camps, and psychiatric

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1. CNN's China expert Willy Wo-Lap Lam has reported that the persecution of Falun Gong was an attempt by Jiang to secure his own power. In the words of Lam, "the most severe criticism leveled at Jiang's handling of the Falun Gong [by insiders in China] is that he seems to be using the mass movement to promote allegiance to himself." Willy Wo-Lap Lam, "China's Suppression Carries a High Price," *CNN.com* (February 2001).

2. *See* discussion *infra,* in Section II. B. (2)

facilities. Several hundred Falun Gong adherents reportedly have died in detention due to torture, abuse, and neglect since the crackdown on Falun Gong began in 1999."[3]

Falun Gong adherents – even some who are citizens of the United States – remain in Chinese detention and re-education centers and are subjected to forms of torture equal in tragic dimension to the experience of the Jewish population during the Second World War, the Bosnians in Bosnia-Herzegovina, and the Tutsis in Rwanda. Legal redress is not possible in China. Plaintiffs have turned to U.S. courts for redress through legal channels, aware that it is their only possible avenue for relief.[4]

On October 18, 2002, the individual plaintiffs in this case filed a class action lawsuit in the United States District Court for the Northern District of Illinois against Jiang Zemin and the Falun Gong Control Office (a.k.a. Office 610). The defendants never responded to the complaint. The United States filed a "Motion to Vacate October 21, 2002 Order and Statement of Interest or . . . Suggestion of Immunity" on December 12, 2002. Thirty-nine members of Congress filed an *amicus curiae* brief on June 12, 2003, in opposition to the positions adopted by the Executive Branch in their above referenced motion and subsequent pleadings submitted in support thereof. The District Court entered its order on September 15, 2003, dismissing the case in its entirety. The District Court below held that head-of-state immunity shields former heads of state for acts of torture,

3. In a previous Country Report, the State Department specified that the bodies of many of the Falun Gong practitioners who died from torture "bore signs of severe beatings or torture, or were cremated before relatives could examine them. . . ." U.S. Dept. of State Country Reports on Human Rights Practices: China (Feb.23, 2001).

4. The Seventh Circuit concludes its decision by stating that it is not unsympathetic to the appellants' claims, but that the success of the effort to put an end to these human rights violations rests on diplomacy, not United States courts. Notwithstanding the United States' desire to end the persecution in China through diplomatic channels, six years of diplomatic overtures have in no way curtailed or even diminished the severity of the persecution.

genocide and other crimes against humanity, and that suggestions of immunity based on foreign policy concerns raised by the Executive Branch merit absolute judicial deference. Plaintiffs filed a motion for reconsideration of the same case on September 29, 2003. On October 15, 2003, the District Court entered its order denying Plaintiffs' motion for reconsideration in its entirety.

On November 15, 2003, Plaintiffs filed a Notice of Appeal with the United States Court of Appeals for the Seventh Circuit from both decisions of the District Court. The Seventh Circuit's decision was entered on September 12, 2004.

REASONS FOR GRANTING THE PETITION

It is undisputed that Respondent Jiang no longer holds the position of head of state of the People's Republic of China, and that he also surrendered his position as head of the Central Committee of the Communist Party of China.[5] Case precedent overwhelmingly supports the principle that former heads of state do not enjoy the same immunity as foreign officials presently serving in that capacity.[6] Only currently sitting heads of state are granted head-of-state immunity. The Seventh Circuit's position extending immunity to a former head of state is at odds with prevailing judicial opinion, including the views of the Second and Fourth Circuits that the head-of-state defense does not protect former heads of state permanently from civil liability, under the rationale that this type of immunity is an attribute and privilege of the sovereign state and not an individual right, and therefore expires when a head of state leaves office.[7] The Seventh Circuit's decision is also inconsistent with the underlying rationale as to why head-of-state immunity is recognized by

5. Jiang Zemin left the posts of Chair of the Communist Party and of President of China in November of 2002 and in March of 2003 respectively. *See, e.g.*, Plaintiff's Notice of Change in Defendant's Status, April 14, 2003.

6. These cases are discussed *infra* in Sections I.A, I.B.

7. *See Republic of Philippines v. Marcos*, 860 F.2d 40, 45 (2nd Cir. 1988) (citing *In re Grand Jury Proceedings*, 817 F.2d, 1108, 1111 (4th Cir. 1987)).

U.S. Courts. Immunity is accorded to heads of state as a matter of judicial comity in recognition of the mutual need not to allow courts to interfere with the proper operations of foreign governments by imposing barriers and penalties upon visiting heads of state. Once a foreign head of state has left office, that concern is substantially reduced or eliminated, and the need for applying head-of-state immunity is similarly diminished or eliminated.

In the proceedings below, neither the District Court nor the United States Court of Appeals for the Seventh Circuit took proper cognizance of the diminished applicability of head-of-state immunity once a head of state has left office. Their consideration of this case, as if it were a complaint against a sitting head of state, did not take proper account of the factual circumstance of Respondent Jiang having left office, or of the substantial legal precedents indicating that former heads of state are not accorded the same immunity and protected status as sitting chief executives.

While the District Court below recognized that former heads of state cannot be considered immune for their private acts (App. C. at 39a), neither the District Court nor the United States Court of Appeals took proper cognizance of the fact that torture and other *ultra vires* violations of *jus cogens* norms of international law are outside the scope of recognized and lawful government authority and must be considered by their nature similar to private acts. As a result, the Seventh Circuit decision is at odds with a substantial body of case law, including decisions of the Ninth and Fifth Circuits, which hold that immunity does not attach to *ultra vires* acts that go beyond what an official is authorized to do, and that therefore must be characterized as unauthorized, individual, and "not official" acts by United States courts, even if they were carried out under color of law. This is true whether the illegality is based on the domestic laws of the affected foreign nation, or on international law, and most especially when fundamental and universally recognized *jus cogens* norms of international law have been violated.

While federal courts grant an automatic deference to suggestions of immunity submitted by the Executive Branch as to the factual issue of whether or not a potential defendant currently serves as head of state, courts are not obliged to accept executive suggestions raising jurisdictional objections based on other grounds, such as act of state or potential interference with foreign policy or foreign relations concerns. In the latter circumstances courts must follow the standards established by the U.S. Supreme Court in *Sabbatino v. Banco Nacional de Cuba,* 375 U.S. 398, 401, 418 (1964), and *Baker v. Carr,* 369 U.S. 186 (1962), requiring the courts to balance foreign policy and other political considerations against other factors, notably the level of clarity and universal acceptance of the legal standards that are alleged to have been violated. The District Court and the Seventh Circuit Court of Appeals in the present case did not properly apply this standard. The circumstances of this case indicate that the exercise of jurisdiction is warranted since the potential impact on foreign relations is minimal, while the violations of international law that have been alleged, including violations of *jus cogens* standards that include some of the clearest and most universally accepted norms are of a type that courts can properly be expected to interpret and apply. Congress also has specifically recognized these norms through specific legislation (such as the Torture Victims Protection Act and the Convention Against Torture implementing statutes passed in 1994 and 1998) as justifying, and even mandating, recognition and application by U.S. Courts.

The Seventh Circuit's decision stands alone among the circuits in holding that *jus cogens* violations of former foreign officials can be considered protected and immune acts. Review is warranted to resolve the conflict among the circuits and to avoid the likelihood of future conflicts regarding the "unprotected" or "protected" status of acts such as these. Review is further warranted to ensure that the Executive Branch does not encroach upon the ability of U.S. Courts to interpret and apply firmly established standards of law.

I. FORMER HEADS OF STATE ARE NOT ENTITLED TO THE SAME IMMUNITY AS FOREIGN OFFICIALS PRESENTLY SERVING AS CHIEF EXECUTIVES OF THEIR COUNTRIES.

As reflected in almost two hundred years of legal precedent, the doctrine of head-of-state immunity provides complete protection to sitting foreign heads of state from the exercise of judicial process by U.S. Courts. However, this immunity is procedural in nature, and only attaches to the person of the head of state while he or she is in office, as it is aimed at allowing heads of state to carry out their duties efficiently and effectively without interference from the courts. Thus, in *Aristide*, the court gave special weight to the finding that the defendant could not be held subject to suit while in the exercise of his diplomatic duties and functions as the elected President of Haiti (*LaFontant v. Aristide*, 844 F. Supp. 128, 139 (E.D.N.Y. 1994)), and that as "the chief representative of his nation, he enjoys extraterritorial status when traveling abroad." (citing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137-139 (1812)). Or, as the British House of Lords in *Ex Parte Pinochet* stated, procedural immunity is necessary to protect the office and its functions, not the individual, and thus, while it is "attached to and protective of the office, it is lost when the individual is no longer in post." *Queen v. Bow Street Metropolitan Stipendiary Magistrate (Ex parte Pinochet Ugarte)*, 1 App. Case. 147, 149 (1999).

While procedural immunity is attached to the office and its diplomatic functions and operations, and only temporarily attaches to the office holder, substantive immunity is of an entirely different nature. "Otherwise defined as residual immunity, it only protects the activities performed by state officials in the exercise of their legitimate functions."[8] Thus,

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8. *See* Andrea Bianchi, "Immunity versus Human Rights: The Pinochet Case," *EJI*, p. 254 (1999). *See also* Andrea Bianchi, "Denying State Immunity to Violators of Human Rights," 46 *Austrian Journal of Public and International Law*, pp. 227-228 (1994).

while this second form of immunity continues even after the person departs from office, it offers no protection for acts that do not qualify as legitimate state functions, such as private or *ultra vires* acts that are outside the scope of official authority. Consequently, when a ruler leaves his sovereign office, he is not immune for acts of torture and other *ultra vires* violations of *jus cogens* norms that, like private acts, are unprotected and can be considered not immune as a matter of law.

A. Former Heads of State Are Not Entitled To Claim Head-of-State Immunity.

Case precedent overwhelmingly supports the principle that former heads of state do not enjoy the same immunity as foreign officials presently serving in that capacity. Numerous courts have made clear that head-of-state immunity applies only to a foreign leader or ruler *who is still in office*. In *El-Hadad v. Embassy of the United Arab Emirates*, 69 F. Supp. 2d 69, 82 (D.D.C. 1999), the District Court denied head-of-state immunity to three individual defendants who invoked the defense because "[n]one of the defendants is alleged to be the *sitting* official head of state of the U.A.E." (emphasis added). *See also First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1121 (S.D. Tex. 1994) ("the Dubai defendants [as well as the estate of its former ruler] would not be entitled to head-of-state immunity, because they do not represent the state as its current ruler"); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 797-98 (N.D.Cal. 1987) (head-of-state doctrine does not "encompass all government officials of a foreign state to whom the State Department chooses to extend immunity," but is limited to a sovereign or foreign minister, the "two traditional bases for a recognition or grant of head-of-state immunity"); S. Sucharitkul, *State Immunities and Trading Activities In International Law* 27-28 (1959) ("upon the cessation of their public functions sovereigns and diplomats are no longer entitled to any jurisdictional immunity"), *and see id.* at 32-34, 47-50; *Republic of Philippines,* 806 F.2d 344, 360 (2nd Cir. 1986) (failing to reach the issue directly, but noting

that the court was "not at all certain" that head-of-state immunity applied to former heads of state).

Most recently, members of this Court supported the principle of non-immunity for former heads of state. In their concurring opinions in the *Republic of Austria et al., v. Altmann*, 124 S. Ct. 2240 (2004), Justices Breyer and Souter stated that former heads of state lose immunity status once they cease to be head of state. In support, the concurrence noted that while the King of Egypt's sovereign status permitted him to ignore Christian Dior's payment demand for clothing purchased for his wife, once the king lost his royal status, he was amenable to suit (citing *Ex-King Farouk of Egypt v. Christian Dior*, 84 Clunet 717, 24 I.L.R. 228, 229 (CA Paris 1957); and citing *Ex parte Ugarte*, 1 App. Case. 147, 201-202 (1999) ("the head of state is entitled to the same immunity as the state itself . . . [but] he too loses immunity *ratione personae* on ceasing to be head of state")).

B. The Seventh Circuit's Decision Conflicts Squarely with Underlying Policies As To Why Sitting Heads of State Are Immune.

The principle of non-immunity for former heads of state is dictated by the underlying reasoning as to why head-of-state immunity is recognized by U.S. Courts, namely that comity between nations demands mutual respect for the principle that courts of one nation must not act to interfere with the proper official functioning of sister states by limiting their heads of state in the performance of their official functions and duties. *See LaFontant v. Aristide,* 844 F. Supp. at 132 (citing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *See also* L. Henkin, *International Law* 893 (2d Ed. 1987).

However, as the courts have recognized, concerns regarding comity and the need for assuring the immunity protection for visiting heads of state no longer apply once a head of state has left office, since the potential for any interference with the functioning of foreign governments has been substantially reduced or eliminated by the change in the former head of state's

status. As an entitlement that belongs not to the individual but to the state, head-of-state immunity cannot be invoked by former leaders who no longer represent the state in an official capacity. Thus, in *Estate of Domingo v. Marcos,* 694 F. Supp. 782, 786 (W.D. Wash. 1988), the District Court declined to extend a suggestion of immunity filed by the Executive Branch beyond tenure in office because head-of-state immunity is granted on the basis of comity "to avoid the disruption of foreign relations," and once a head of state leaves office, these arguments are no longer relevant. "Head-of-state immunity serves to safeguard the relations among foreign governments and their leaders, not as the Marcoses assert, to protect former heads of state regardless of their current official status." *Id. See also Republic of Phillippines v. Marcos*, 806 F.2d 344, 360 (avoiding embarrassment to our government and showing respect for a foreign state may well be absent when the individual is no longer head of state).

Other courts, including the Second and Fourth Circuits, also have recognized that the head-of-state defense does not serve a "protective function shield[ing former heads of state] from the chilling effect of future liability," under the rationale that "immunity derives from and remains always an attribute of state sovereignty" and is not a personal right. *See Republic of Philippines v. Marcos,* 860 F.2d 40, 45 (2nd Cir. 1988); *see also In re Grand Jury Proceedings,* 817 F.2d 1108, 1111 (4th Cir. 1987).[9]

By extending head-of-state immunity to an individual who no longer embodies the sovereignty of another nation, the Seventh Circuit improperly detaches head-of-state immunity from principles of state sovereignty and transforms it into an individual right without regard for or consideration of the

9. *Cf. In re Application of Alvaro Noboa*, 1995 WL 581713 (S.D.N.Y.) ("immunity of a diplomat . . . is not a privilege of the person, but of the state he represents, [and] having divested herself of the status pursuant to which she claims the privilege, there is no reason why she should not be subject to process [*nunc pro tunc*] like other persons.")

policies upon which the doctrine of head-of-state immunity is based.

More generally, in the proceedings below, neither the District Court nor the Court of Appeals for the Seventh Circuit took proper cognizance of the difference in legal protections that apply once a head of state leaves office. Their consideration of the case as if it were a complaint against a sitting head of state did not take proper account of the factual circumstances regarding Respondent Jiang having left office, or of the substantial legal precedents indicating that former heads of state are not accorded the same immunity and protected status as sitting chief executives.

The Seventh Circuit's disregard of these principles and precedents warrants review.

II. THE SEVENTH CIRCUIT DECISION IS AT ODDS WITH THE EXPANDING BODY OF LAW THAT HOLDS THAT FORMER HEADS OF STATE ARE NOT ENTITLED TO CLAIM IMMUNITY FOR CONDUCT THAT IS *ULTRA VIRES*, BEYOND LAWFUL AUTHORITY AND IN VIOLATION OF *JUS COGENS* STANDARDS OF INTERNATIONAL LAW.

A substantial body of case law has established the principle that even though sitting foreign heads of state may be entitled to various forms of immunity from judicial process in U.S. Courts, such immunity does not attach to former foreign heads of state and officials for acts that are private and unofficial or *ultra vires* and unlawful in nature. The unprotected and "not official" nature of such actions has been characterized and explained in a variety of ways by U.S. Courts. This principle applies to actions that are deemed to be of a personal nature and therefore outside the scope of official authority. It also applies to *ultra vires* actions that go beyond what an official is authorized to do, and therefore must be considered "not official" in nature and beyond the scope of authority and of immunity claims. This is true whether the illegality is based on the domestic laws of the affected foreign nation, or is found to be contrary to

international law, and especially fundamental and universally recognized *jus cogens* norms. The alleged acts of torture and genocide by Respondent Jiang are unprotected and not immune, not only because they are domestically prohibited and in direct violation of the domestic law of China, but also, and most importantly, because they violate *jus cogens* norms embodied in numerous international treaties and in customary international law.

A. The Seventh Circuit's Decision Is At Odds with the Ninth and Fifth Circuits and Other Courts That Hold That a Former Head of State Is Not Immune for Acts of Torture and Other Abuses That Are beyond Official Authority, and Therefore Must Be Considered Illegal and *Ultra Vires*.

By affirming the District Court's extension of head-of-state immunity protections to a former head of state for his *ultra vires* acts, the Seventh Circuit's decision is at odds with the expanding body of Circuit Court opinions. These opinions hold that former leaders and officials are not immune for acts that are personal in nature, individual, unlawful, *ultra vires,* and outside the scope of official authority. Therefore, they must be treated like private unprotected acts even when carried out under color of law.

1. *Ultra Vires* Acts Are not Protected and not Immune, Similar to Private Acts.

The unprotected and non-immune status of private acts has been affirmed in many judicial decisions of the courts. In *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch), 116, 145 (1812), this Court indicated its intention to deny immunity to foreign leaders for acts that must be deemed private and unofficial in nature, holding that even a 'prince' or head of state may not be immune for his purely private conduct as he "may be considered as laying down the [mantle of the] prince, and assuming the character of a private individual," when he "acquires private property." *See also In Re Doe*, 860 F.2d 40, 45 (2nd Cir. 1988) ("there is respectable authority for denying

head-of-state immunity to a former head of state for his private or criminal acts in violation of American law"); *The Republic of the Philippines v. Marcos*, 806 F.2d 344, 360 (2nd Cir. 1986); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987).

According to Webster's Third New International Dictionary, as acts that have been perpetrated "in excess of legal power or authority (as vested in . . . an official or legislative body)," "*ultra vires*" acts are by definition "not official" acts. They are what the state or community does not authorize, or even prohibits. An act by an official is *ultra vires* if it has not been validly authorized, and is "outside the scope of his authority." *In re Estate of Ferdinand Marcos, Human Rights Litigation ("Hilao II")*, 25 F.3d 1467, 1472 (9th Cir. 1994). Thus courts have applied the *ultra vires* standard to find acts that are beyond the lawful authority of the state to be individual, non-sovereign, and therefore unprotected. In *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990), the Ninth Circuit characterizes as *ultra vires,* and therefore "non-sovereign," actions that are unprotected because they are beyond the legal authority of the state, when it states (citing *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949)): "[W]here the officer's powers are limited by statute, his actions beyond those limitations are not sovereign actions. The officer is not doing the business that the sovereign has empowered him to do." Similarly, in *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 304 (9th Cir. 1992), the court states, affirming that the defendant acted *ultra vires:* "[I]f the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the . . . state." *Cf. Ex parte Young*, 209 U.S. 123, 159 (1908) ("the use of the name of the state to enforce an unconstitutional act . . . is a proceeding without the authority of . . . the state in its sovereign or governmental capacity.").

2. The Seventh Circuit's Decision Conflicts with Other Circuits That Hold That a Former Head of State's Acts of Torture and Other Violations of Human Rights Are *Ultra Vires*, Illegal and Unprotected under U.S. Law.

The Seventh Circuit's decision is at odds with Ninth and Fifth Circuit decisions that have applied the *ultra vires* standard to acts of torture and other violations of the domestic law of the foreign state or violations of international law. These decisions find acts of torture and other violations of human rights by foreign public officials to be *ultra vires,* not official, and non-immune, like private unauthorized acts, even though they have been committed under "color of law." In *Hilao II*, 25 F.3d 1467, 1470 (9th Cir. 1994), the Ninth Circuit held that alleged acts of torture, execution and disappearances "of a dictator are not 'official acts' unreviewable by federal courts." In this case, former President Ferdinand Marcos was held to be subject to judicial scrutiny because his "individual" and *ultra vires* acts could never qualify as "official" or "sovereign" acts conferring immunity. *Id.* at 1471. "[Marcos] was not the state, but the head of state, bound by the laws that applied to him," the court declared. *Id.* (quoting *The Republic of the Philippines v. Marcos*, 862 F. 2d 1355, 1361 (9th Cir. 1988)). *See also In re Estate of Ferdinand Marcos*, 978 F.2d 493, 498 (9th Cir. 1992) ("[defendant's] acts cannot have been taken within any official mandate and therefore cannot have been acts of . . . a foreign state").

Affirming the legality of the extradition of former head of state Marcos Perez Jiminez to Venezuela, in *Jiminez v. Aristeguieta*, 311 F.2d 547, 558 (5th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963), the Fifth Circuit similarly held that the former head of state's financial crimes and acts of murder could not be characterized as acts of the Venezuelan sovereign but were common crimes, "done in violation of his position and not in pursuance of it." *See also Erwin v. Quintanilla*, 99 F.2d 935, 939 (5th Cir. 1938) ("immunity from jurisdiction will be

denied a foreign sovereign where . . . breach of our laws occurred.");[10] *In re Grand Jury Proceeding,* 817 F.2d 1108, 1110-11 (4th Cir. 1987) (as "an attribute of state sovereignty, [head-of-state immunity] . . . would seem to extend no further than the authorized official acts taken while the ruler is in power").

This principle is dictated by an important policy as to why immunity is not recognized for former heads of state for unofficial acts, namely that foreign policy concerns are less implicated in situations involving officials who have acted outside their official capacities. *See*, for example, *Hilao II,* 25 F.3d 1467, 1472 (9th Cir. 1994) ("[a] lawsuit against a foreign official acting outside the scope of his authority does not implicate any of the foreign diplomatic concerns involved in bringing suit against another government in United States courts"). *See also*, *Xuncax v. Gramajo*, 886 F.Supp.162, 175 (D. Mass. 1995); *Shalaby v. Saudi Arabian Airlines*, 1998 WL 782021 (S.D.N.Y). As a result, a court does not risk unfavorable foreign policy implications if it takes issue with the Executive Branch's efforts to extend head-of-state immunity to a former head of state for acts that are unauthorized and "not official."

3. Former Foreign Officials' Acts of Torture and other *Ultra Vires* Acts are not Protected and not Immune just like Private, Nonimmune Acts.

Many other U.S. cases have applied the *ultra vires* rationale with respect to violations of international law and/or relevant U.S. or foreign domestic law to find acts of torture and other human rights violations by former public officials to be *ultra vires* and not immune, similar to private, nonimmune acts.[11] *See*, for example, *Letelier v. Republic of Chile*, 488 F. Supp.

10. *See also United States v. Noriega,* 746 F. Supp. 1506, 1521 (S.D.Fla. 1990) where the court declined to dismiss the case against the former leader of Panama under the act of state doctrine for violations of the domestic law of Panama, because the inquiry is whether or not his "activities are 'acts of state,' i.e., that they were taken on behalf of the state and . . . not on behalf of the actor himself."

11. *See Schooner v. McFaddon,* 11 U.S.at 144, and analysis *supra* in II. A. 1.

665, 673 (D.D.C. 1980) ("[t]here is no discretion to commit, or to have one's officers or agents commit, an illegal act . . . no 'discretion' to perpetuate conduct designed to result in an . . . assassination . . . action that is clearly contrary to the precepts of humanity as recognized in both national and international law."); *Xuncax v. Gramajo,* 886 F. Supp. 162, 176 (D.Mass. 1995) (where the court denied immunity to Hector Gramajo, the former Guatemalan Minister of Defense, for his acts of summary execution and disappearances because "the acts which form the basis of these actions exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority," and the court also stated that "[t]here is no suggestion that either the past or present governments of Guatemala characterize the actions alleged here as 'officially' authorized"); *Paul v. Avril*, 812 F. Supp. 207, 211–212 (S.D. Fla. 1993) (the court denied immunity to Prosper Avril, the former head of the Haitian military, for human rights violations because "the acts as alleged in the complaint, if true, would hardly qualify as official public acts"); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1197-98 (S.D.N.Y. 1996) ("the alleged acts of torture committed by Assasie-Gyimah fall beyond the scope of his authority. . . . [t]herefore, he is not shielded from Cabiri's claims"); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D.Cal. 1987) (holding that acts of torture, extra-judicial execution and arbitrary detention by a former member of the junta conducting Argentina's "dirty war," although somewhat "official," were not governmental, "public" or "public official" acts nor "ratified," but were "illegal" acts).

The United States Senate also has recognized that the justification for an immunity claim disappears in cases filed under the Torture Victim Protection Act, 28 U.S.C. § 1350 ("TVPA"), authorizing courts to adjudicate alleged acts of torture, when the foreign official in question leaves office.[12]

12. The TVPA provides that an individual who "under actual or apparent" authority, or color of law, subjects an individual to torture shall be liable for damages to that individual. *See* 28 U.S.C. § 1350.

For example, during the passage of the TVPA, the Senate Judiciary Committee stated that:

> the Committee does not intend [head-of-state or other immunity claims based on official status] to provide former officials with a defense to a lawsuit brought under this legislation. . . . [T]he FSIA should not normally provide a defense to an action taken under the TVPA against a former official. . . . [T]he committee does not intend the 'act of state' doctrine to provide a shield from lawsuit for former officials.

S. Rep. No. 249, 102d Cong., 1st Sess., at 8 (1991).

> Moreover, the Senate Committee report notes:
> since [the act of state] doctrine applies only to 'public' acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

S. Rep. No. 249, 102d Cong., 1st Sess., at note 15.

Even the Executive Branch has acknowledged that the justification for immunity in cases brought under the TVPA (one of the grounds of this case) disappears when the foreign official leaves office. *See Doe v. Qi*, 2004 WL 2901626 (N.D. Cal. 2004).

In a letter dated September 25, 2002, from William H. Taft, IV, Legal Advisor, U.S. Department of State, to Robert D. McCallum, Jr., Assistant Attorney General, the State Department:

> acknowledge[d] the expanding body of judicial decisions under the TVPA holding *former* foreign government officials liable for acts of torture and extrajudicial killing despite (or indeed because of) the fact that the defendants abused their governmental positions. . . . [and that the TVPA provides an] explicit statutory basis for suits against former officials . . . for acts of torture and extrajudicial killing committed in an official capacity.

The Seventh Circuit's expansion of the head-of-state immunity doctrine to former heads of state for acts that cannot

be characterized as "official" acts or "legitimate state functions," is at odds with several Circuit Court holdings and presents a substantial issue for review.

B. The Seventh Circuit Conflicts with Other Circuits in Holding That a Foreign Official's Violations of *Jus Cogens* Norms Are Protected Immune Acts.

Violations of *jus cogens* norms of international law must also be considered outside of immunity protections. Even in our nation's early history, former heads of state were not deemed immune for acts in violation of customary norms of international law and firmly established *jus cogens* norms. Thus, in *Santissima Trinidad*, 20 U.S. (7 Wheat.) 283 (1822), the Supreme Court held that although a public vessel of a foreign sovereign was ordinarily entitled to immunity from libel proceedings in American courts, immunity could not be invoked if the vessel had violated the laws of neutrality under the "law of nations." *Id.* at 353. The Court directly analogized that situation to the immunity of a foreign sovereign or head of state:

> [A] foreign sovereign cannot be compelled to appear in our Courts, or be made liable to their judgment, so long as he remains in his own dominions. . . . If, however, he comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of his nation.

Id.[13]

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13. Justice Story's opinion for the Court reflects the clear rule of customary international law summarized in Vattel's treatise: that a foreign ambassador should be given immunity "unless he violates the law of nations by some enormous crime." Emmerich De Vattel, *The Law of Nations* ch. 2, § 34 (1758). Vattel's *Law of Nations* was the authoritative treatise on international law; it had equivalent stature to Blackstone's *Commentaries*, and could be found in the libraries of most of the framers of the Constitution. In the 19th Century, Vattel was the most cited author on international law in the opinions of the Supreme Court.

The analogy is precise. The ship can be attached if it violated norms of customary international law, in this instance the international prohibition against acts taken in violation of the law of neutrality. Similarly, a head of state can be personally subjected to American jurisdiction if he violates norms of customary international law, and firmly established *jus cogens* norms.[14]

1. Violations of Torture and Other *Jus Cogens* Norms Perpetrated by Foreign Officials Are Not Legitimate State Functions and Are Not Protected and Not Immune.

Plaintiffs' complaint is based upon allegations that constitute behavior manifestly in violation of the most basic rules of customary international law, and indeed of civilized conduct. Plaintiffs seek redress not merely for acts that are *ultra vires,* but more particularly, for violations of *jus cogens* norms, including but not limited to the crimes of genocide and torture. *See* RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT THIRD] § 702, cmt. n (1987), stating that acts of genocide, slavery and extrajudicial killing violate *jus cogens* norms. *See also Siderman de Blake v. Republic of Argentina* [hereinafter *Siderman*], 965 F.2d 699, 717 (9th Cir. 1992) (the prohibition against torture "carries with it the force of a *jus cogens* norm," which enjoys the "highest status within international law").

Jus cogens violations are qualitatively different from other *ultra vires* acts. As defined in the Vienna Convention on the Law of Treaties [hereinafter Vienna Convention], May 23, 1969,

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14. *Accord The Appam*, 243 U.S. 124 (1917) (sovereign immunity of a public ship does not extend to such prize and property captured in violation of the forum's neutrality). *See also* E. De Vattel, *The Law of Nations*, ch. 4, § 54 (1758), insofar as it extends the unprotected sphere of head of state activity to include acts of murder, presumably as violations of the domestic law of the foreign state ("[t]he Prince who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer considered in any other light than that of an unjust and outrageous enemy").

1155 U.N.T.S. 332, 8 I.L.M. 679, a *jus cogens* norm, also known as a "peremptory norm" of international law, "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention, art. 53 (cited in *Siderman, id.* at 714-719). The RESTATEMENT THIRD, *supra*, § 102 comment (d) adopts the Vienna Convention's definition of *jus cogens* norms as binding on all nations and "derived from values taken to be fundamental by the international community rather than from the ... choices of nations."[15]

The underlying justification for revoking immunity for officials who violate *jus cogens* norms of international law is that a sovereign state cannot defend these acts as official, legitimate functions of the state. Thus, in *The Presbyterian Church of Sudan v. Talisman Energy Inc. and the Republic of Sudan*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003), the District Court held that all states may exercise a universal jurisdiction over acts committed in violation of *jus cogens* norms because these violations are fundamentally different from other international law violations by virtue of the "depths of depravity the conduct encompasses, the often countless toll of human suffering the misdeeds inflict upon their victims, and the consequential disruption of the domestic and international order they produce." (citing *Tachonia v. Mugabe*, 234 F. Supp. 2d 401, 415-16 (S.D.N.Y. 2002).[16]

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15. As the International Court of Justice notes, violations of these norms constitute violations of obligations owed to all ("obligations *erga omnes*"). *The Barcelona Traction, Light & Power Co. ("Belgium v. Spain")* 1970 I.C. J. 3, 32; also see, RESTATEMENT THIRD, *supra*, § 702, cmt. o. *See also id.* § 404.

16. The same rationale explains the British House of Lord's decision, 6-1, that ex-Chilean President Pinochet's acts of torture are not amenable within the functions of a head of state. *See Ex parte Pinochet Ugarte*, 1 App. Case. 147, 165(d) (1999) (although the alleged

(Cont'd)

2. Respondent Jiang's Alleged Crimes Rise to the Level of *Ultra Vires* Acts that Violate Domestic Chinese Law and *Jus Cogens* International Standards.

The Respondent's acts of torture, genocide and the other abuses detailed by Plaintiffs in their complaint not only violate the domestic law of the People's Republic of China, but also violate *jus cogens* standards of international law. The Government of China itself has disclaimed publicly the alleged violations in documents submitted *ex parte* to a federal court in the related case of *Doe v. Qi*, 2004 WL 2901626 (N.D. Cal. 2004).[17] The Chinese Government's clear written assurance to a U.S. Court that any human rights abuses resulting from the campaign of persecution against Falun Gong are unlawful and unauthorized under their system, and violate provisions of Chinese law, provides a clear basis for finding that the Respondent operated outside and beyond the legitimate scope of his authority, and that his acts of torture and genocide violate *jus cogens* standards of international law.

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acts of torture were carried out by General Pinochet "under colour of his position as head of state . . . they cannot be regarded as functions of a head of state under international law when international law expressly prohibits torture as a measure which a state can employ in any circumstances whatsoever and has made it an international crime").

17. In *Doe v. Qi*, the District Court of Northern California said,

> [w]here, as here, the People's Republic of China appears to have . . . publicly disclaimed the alleged human rights violations caused or permitted by Defendants . . . and asserts that such violations are in fact prohibited by Chinese law, Defendants cannot claim to have acted under a valid grant of authority. . . . The authorities presented by Plaintiffs establish that the alleged conduct for which the Defendants are responsible was inconsistent with Chinese law. Accordingly . . . sovereign immunity thereunder does not lie.

Id. at 29.

The Seventh Circuit's decision stands alone among the circuit decisions in holding that acts of torture and other *jus cogens* violations of a former head of state or foreign official can be considered protected and immune acts. The decision is unprecedented. Left undisturbed, it will undermine the legislative intent of Congress in its passage of the TVPA. Review is further warranted to resolve the conflict among the circuit courts and to avoid the likelihood of future conflicts concerning the "unprotected" or "protected" status of acts such as these.

C. Respondent Jiang Is Not Eligible To Claim FSIA Immunity Protection.

The Respondent cannot claim foreign sovereign immunity protections as a basis for seeking to shield his actions from judicial process in the United States.

1. The FSIA Provisions Do Not Govern the Acts of Foreign Officials That are beyond the Scope of their Official Authority.

The Seventh Circuit decision acknowledges that acts of torture and genocide qualify as violations of *jus cogens* norms, and that *jus cogens* norms are "norms from which no derogation is permissible." (App. A. at 13a). However, the opinion cites its holding in *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1149-50 (7th Cir. 2001), as "instructive" to suggest that foreign sovereign immunity considerations under the FSIA attach automatically to heads of state because heads of state are indistinguishable from the foreign sovereign, in total disregard of the fact that the FSIA provisions govern only foreign nations and their instrumentalities.

It is critical to understand that the suit in *Sampson v. Federal Republic of Germany*, and the analogous circuit court cases cited by the Seventh Circuit for the same proposition, were not filed against the individual officials responsible for the *jus cogens* violations, but against the government itself.[18] The provisions

18. *See* App. A at 13a, where the Seventh Circuit cites *Smith v.* (Cont'd)

of the FSIA that grant immunity to foreign governments do not automatically attach to a suit against a foreign official. In this case, the challenged acts of torture, genocide, and crimes against humanity are not only violations of *jus cogens* norms, they are beyond the scope of Respondent Jiang's authority as head of state, and therefore constitute *ultra vires* conduct. This is the precise distinction drawn by the Ninth Circuit in *Hilao II*, 25 F.3d at 1471-72, to explain its departure from its holding in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992):

> *Siderman* does not dictate a different result. . . . *Siderman* was an action against the Republic of Argentina. . . . In this case, the action is against the estate of an individual official who is accused of engaging in activities beyond the scope of his authority . . . acts of torture, execution and disappearance . . . not taken within any official mandate, and therefore not the acts of a . . . foreign state.

The Ninth Circuit carefully characterized the former leader's *jus cogens* violations as conduct "beyond the scope of his authority." This clearly underscores the difference between cases in which the sovereign state is sued directly, as for example, *Siderman de Blake v. Republic of Argentina*, and a lawsuit against a foreign official for his *ultra vires* actions. Even if the official, lawfully exercised acts of a foreign official could be characterized as covered by FSIA protections, such immunity would not apply to actions taken outside the scope of his authority.

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Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany*, 26 F.2d 1166, 1173 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992).

2. All the Cases the Seventh Circuit Decision Cites in Support of the Applicability of Foreign Immunity Preceded the Passage of the FSIA and are therefore not Relevant or Controlling.

The cases cited by the Seventh Circuit in support of claims for deference based on FSIA grounds are not relevant because they were decided before the passage of the FSIA and the FSIA statute has changed the way courts now handle these matters. Moreover, as the FSIA was designed to curtail the Executive's role in sovereign immunity decisions to "free the government from the case-by-case diplomatic pressures [placed upon it by foreign governments seeking to have their case dismissed through diplomatic and political channels] . . . and to assure litigants that . . . decisions are made on purely legal grounds and under procedures that ensure due process," the FSIA itself speaks against an expansion of the suggestion of immunity procedure, most notably in a case where the Executive has been subject to the very same political pressures to have the case dismissed through diplomatic channels rather than decided on legal grounds under "procedures that ensure due process." *See Verlinden V.B. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).[19]

III. SUGGESTIONS OF IMMUNITY ARE CONSIDERED BINDING ONLY WHEN THEY DEAL WITH FACTUAL DETERMINATIONS REGARDING THE HEAD-OF-STATE STATUS OF SITTING FOREIGN OFFICIALS.

While federal courts grant considerable deference to suggestions of immunity submitted by the Executive Branch as to the factual issue of whether or not potential defendants currently serve foreign nations as heads of state, automatic deference is not granted for executive submissions raising

19. *See generally*, P. Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale Stud. in World Pub.Ord. 1, 34-36 (1976) (discussing the impact of political factors on State Department immunity determinations).

jurisdictional objections based on other grounds such as foreign sovereign immunity, act of state, or potential interference with foreign policy or foreign relations concerns. In the latter circumstance, courts are obliged to follow the standards established by the U.S. Supreme Court in *Baker v. Carr,* 369 U.S. 186 (1962) and *Banco Nacional de Cuba v. Sabbatino,* 375 U.S. 398, 401, 418 (1964) requiring the courts to balance foreign policy impacts against other factors including the level of clarity and universal acceptance of the international legal standards that are alleged to have been violated. The District Court and the Seventh Circuit Court of Appeals in the present case did not properly apply this standard.

Under the circumstances alleged in the case at bar, the *Baker* and *Sabbatino* standards suggest that the exercise of jurisdiction is warranted since the potential impact on foreign relations is minimal, while the violations of international law that have been alleged (including torture and genocide) are among the clearest and most universally recognized, and therefore are of a type that courts can properly be expected to interpret and apply. They also have been specifically recognized by the U.S. Congress through legislation justifying, and even mandating, recognition and application by U.S. Courts.

A. An Automatic Deference Is Conferred When The Executive Branch Submits a Suggestion of Immunity Indicating That a Current Defendant Holds Head-of-State Status.

A central principle of the Seventh Circuit decision – that the enactment of the FSIA did not alter the binding affect of suggestions of immunity filed by the Executive Branch on behalf of foreign heads of state – is consistently reflected in many post-FSIA cases where the government has filed suggestion letters on behalf of **current** heads of state. In *LaFontant v. Aristide*, 844 F. Supp. at 133, the district court dismissed the case against the current leader of Haiti pursuant to a suggestion of immunity filed by the Executive Branch because a "head of state recognized by the United States government is absolutely

immune from the jurisdiction of United States courts." The court clarified its holding by indicating that recognition of a defendant head of state is the "exclusive function of the Executive Branch," and that "it is not a factual issue to be determined by the courts." *Id.* Similarly, in considering Karadzic's claim of head-of-state immunity in *Does v. Karadzic*, 866 F. Supp. 734, 737-38, (S.D.N.Y. 1996), the district court stated (quoting *Republic of Philippines v. Marcos*, 860 F.2d 40, 44-46 (2nd Cir. 1988)): "Were the Executive Branch to declare the defendant a head of state, this court would be stripped of jurisdiction." *See also*, *Flatow v. Republic of Iran*, 999 F. Supp. 1, 24 (D.D.C. 1998) ("[o]nly individuals whom the United States recognizes as legitimate heads of state qualify; whether an individual qualifies as a head of state is a decision committed exclusively to the political branches and the judiciary is bound by their determinations") (citing *Sabbatino*, 376 U.S. at 410). *See also*, *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (claim naming British Prime Minister Thatcher in an action for damages dismissed on the basis of the Government's suggestion of immunity for a sitting head of government); and *Tachonia v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001), citing *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D.Tex. 1994) (dismissing a claim against King Fahd on the appearance by the United States to acknowledge that King Fahd was the recognized and current head of state of Saudi Arabia, which representation the court accepted as conclusive).

B. Executive Suggestions of Immunity That Do More Than Certify an Official's Current Status by Raising Foreign Policy or Political Concerns Are Subject To Judicial Scrutiny.

Executive suggestions that do more than certify a defendant's status as a head of state by raising other jurisdictional objections based on grounds such as act of state, or potential interference with foreign policy and foreign policy concerns do not merit absolute judicial deference. While the Seventh Circuit takes the position that judicial deference is required for all

suggestions of immunity, case precedents indicate the opposite. Where matters other than present head-of-state status are at issue, courts are instead obliged to balance foreign policy impacts against the level of clarity and universal acceptance of the international legal standards that are alleged to have been violated.

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 425, Justice Harlan, writing for an 8-1 majority, concluded that the "proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs ... in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law." Far from denying the role of the federal courts in the interpretation of cases under international law, Justice Harlan encouraged the judicial branch to 'say what the law is' when there is a "greater degree of codification or consensus concerning a particular area of international law ... since the courts can focus on the application of an agreed principle to circumstances of fact." *Id.* at 428. Similarly, in *Baker v. Carr,* 369 U.S. at 211, rejecting its sweeping statement in *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918), the Supreme Court made it clear that *not all questions involving political matters* are beyond the purview of the courts. The Court explained that the political question doctrine is "one of 'political questions,' not one of 'political cases.'"

This approach reflects the basic constitutional principles that call for a shared responsibility among the three branches of government when the interpretation and application of international law are involved.[20] More generally, this approach

20. International law is one of those areas where the coordinate branches have always exercised a partial agency in the acts of the others. While the Constitution authorized Congress to "to define and punish ... Offenses against the "Law of Nations," congress' authority to construe the law of nations was never exclusive. The courts have spent much of their time deciding cases that arise under the law of nations, and more generally deciding cases that affect foreign affairs and international law. The importance of judicial scrutiny in this area is (Cont'd)

is required by the principles of separation of powers – the "blend of powers" that assures that no branch undermine the authority and proper role of the others.[21] An application of the *Sabbatino* and *Baker* standards indicates that the violations of international law alleged in this case are of a type that fall within the proper role and authority of the courts. The basis for adjudication in this case rests not only on the clear congressional mandates and judicially enforceable provisions of the TVPA, but also on the clear and universally accepted standards regarding the prohibitions against torture and genocide embodied in a wide variety of ratified treaties, and in Congressional statutes implementing these standards, as well as firmly established customary international law. Congress has provided a clear mandate in the Torture Victim Protection Act authorizing U.S. courts to deal with these issues. In *Sosa v. Alvarez-Machain*, 542 U.S. __ (2004), this Court expressed its support for the adjudication of violations of the "law of nations" under the

(Cont'd)

especially well reflected in not only the *Sabbatino* and *Baker* balancing tests but the many court cases that in their application of these principles have made clear that judicial review cannot be foreclosed merely because there may be potential impact on foreign policy concerns.

21. Thus as James Madison states in *The Federalist Papers,* separation of powers does "not mean that these departments ought not to have partial agency in or control over the acts of each other." *See, Federalist*, *No. 47,* at 314-315 (James Madison) (Edward Mead Earle ed., 1941). Accordingly, the Court has "not hesitated to strike down provisions of law that . . . accrete to a single branch powers more appropriately diffused among separate branches." *See Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1876)). More generally, on this point, see Paul Bator, *The Constitution As Architecture: Legislative and Administrative Courts Under Article III*, 65 Ind. L.J. 233, 265 (1990):

> [I]t is naive – as well as undesirable – to think of separation of powers rules as capable of creating sealed chambers each of which must contain all there is of the executive, legislative, and judicial powers. Overlap is inevitable. . . . And that is why . . . no branch truly has exclusive jurisdiction even within its own domain.

ATCA based on international norms of as "definite content and acceptance among civilized nations as the historical paradigms familiar when section 1350 [of the ATCA] was first enacted."[22] Torture and genocide meet this standard, and this Court recognized this when it cited the TVPA as a legitimate basis for tort claims against foreign officials. *Id.*

The U.S. Department of State has acknowledged that these violations and abuses have taken place and has publicly condemned them.[23] Consequently, adjudication of the case at bar is warranted not only because it falls within the proper role of the courts to interpret and apply the law, but also because the foreign policy impact is minimal and adjudication is appropriate and would not abridge the authority or proper role of the Executive Branch.

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22. This Court held these crimes to be of such gravity and weight as to find it "neither suitable or appropriate to weigh the proposed standard against potential or foreign policy consequences. *Sosa Alvarez-Machain*, No. 03-339, slip-op. at 38.

23. As indicated *supra* in Section I. B, the Circuit Courts have virtually all indicated that avoidance of embarrassment of the Executive in carrying out foreign policy does not carry much weight when the individual no longer acts in his or her official capacities. More generally, the United States Department of State has taken the position that enforcing customary human rights norms under the ATCA does not contravene U.S. foreign policy. In *Filartiga*, the first human rights case under the ATCA, the State Department submitted an amicus brief in support of plaintiffs. *See Memorandum for the United States as Amicus Curiae*, 19 I.L.M. 585 (May 1980), where the State Department confirms that when an international consensus exists about a right, "there is little danger that judicial enforcement will impair our foreign policy." *Id.* at 604. Although acknowledging that such cases may implicate foreign policy considerations, the brief concludes: "the protection of fundamental human rights is not committed exclusively to the political branches of government." The Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), agreed with the State Department, and specifically rejected the argument that judicial resolution of ATCA suits is barred by the political question doctrine. *See Memorandum for the United States in Filartiga v. Pena-Irala, reprinted in* 12 Hastings Int'l & Comp. L. Rev. 34 (1988).

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED SEPTEMBER 8, 2004

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 03-3989

WEI YE, HAO WANG, DOES, A, B, C, D, E, F,
and others similarly situated,

Plaintiffs-Appellants,

v.

JIANG ZEMIN AND FALUN GONG CONTROL OFFICE,
a/k/a OFFICE 610,

Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division.
No. 02 C 7530—**Matthew F. Kennelly**, *Judge.*

ARGUED MAY 27, 2004—DECIDED SEPTEMBER 8, 2004

Before BAUER, MANION and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* The appellants are practitioners of Falun Gong, a spiritual movement of Chinese origin. Most of the appellants are current or past residents of the People's Republic of China. In addition, two of the appellants are

United States citizens and a third is an alien resident of Illinois. The appellants appeal from a decision of the United States District Court for the Northern District of Illinois dismissing their lawsuit against the former President of China, Jiang Zemin, and an office of the Chinese Communist Party (the "Party") allegedly established by Jiang for the purpose of suppressing Falun Gong. We affirm.

I.

Jiang Zemin served as President of China for approximately ten years, from March 1993 to March 15, 2003. During part of his tenure as President, he also served as the Secretary General of the Central Committee of the Chinese Communist Party (the head of the Party). President Jiang stepped down as head of the Party on November 15, 2002.

Beginning in 1999, the Chinese government and the Party took steps to crack down on Falun Gong.[1] Falun Gong, formed in 1992 by a former Chinese soldier, Li Hongzhi, "combin[es] traditional Buddhist teachings and predictions about the end of the world with meditation and martial arts discipline as a prescription for physical and spiritual well-being. Falun Gong teaches that illness stems from evil

1. We accept, for present purposes, as true the appellants' allegations. We further note that the United States intervened below only to assert President Jiang's immunity and has not taken issue with the veracity of the claims of the appellants. In its brief to this court, the United States draws our attention to remarks of President George W. Bush and State Department Reports condemning the types of practices alleged by the appellants.

and that by following the principles of 'truth, compassion and forbearance,' one can attain clairvoyance and other preternatural faculties."[2] The Chinese government and the Party see things differently. They have denounced the movement as a cult and have accused it of seeking to subvert or overthrow the government and the Party's grip on power.[3] According to at least one news report, President Jiang himself declared that suppressing Falun Gong was one of the " 'three major political struggles' of 1999."[4]

To that end, on June 10, 1999, President Jiang established, as part of the Party's apparatus, the Falun Gong Control Office. The Office is known as "Office 6/10" after the date of its creation. In July 1999, President Jiang issued an edict outlawing Falun Gong. This edict was followed by mass arrests, allegedly farcical trials, torture, forced labor, "re-education," and the killing of members.

The appellants filed this lawsuit against President Jiang and Office 6/10 on October 18, 2002. The appellants' complaint, recites, *inter alia*, claims of torture, genocide, arbitrary arrest and imprisonment, as well as other claims related to the appellants' freedom of conscience, movement, and religion. The appellants argued that the district court

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2. John Pomfret and Michael Laris, "China Outlaws Nonconformist Spiritual Sect; Group Had Organized Protests Across Nation," *Wash. Post*, July 23, 1999, at A1.

3. *Id.*

4. John Pomfret, "China Girds For a Battle Of the Spirit; Ruling Party Fears Religious Challenge," *Wash. Post*, Jan. 10, 2000, at A1.

had jurisdiction to hear their case pursuant to the Alien Tort Claim Act, 28 U.S.C. § 1350, as well as, in part, 28 U.S.C. §§ 1343(4) and 1331.

Because President Jiang was scheduled to be in Chicago on October 22 and 23 on his way to visit with United States President George W. Bush in Washington, D.C., the appellants moved *ex parte* for leave from the district court to effect service on President Jiang (and by extension Office 6/10) while he was in Chicago. The district court granted this motion and entered an order permitting service by delivery of a copy of the summons and complaint "to any of the security agents or hotel staff helping to guard" President Jiang.[5] The appellants contend that service was complete when they delivered a copy of these documents to a Chicago police officer and agents of the United States Secret Service detail stationed at the hotel at which President Jiang was staying in Chicago.

Neither President Jiang nor a representative of the Chinese government or Office 6/10 responded to the complaint, and the appellants moved for an entry of default. The United States, however, intervened pursuant to 28 U.S.C.

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5. We express some concern at the enlistment of agents of the Executive Branch, particularly those charged with providing security for President Jiang's visit, to effectuate service. Our concern is grounded in separation of powers principles as well as the policy ramifications inherent in requiring a Secret Service agent to serve simultaneously as a security guard for a foreign dignitary and a *de facto* process server. Given the outcome of this case we need not thoroughly explore the matter, however, as the problem should not recur.

§ 517 and moved to vacate the service order or, in the alternative, to assert head-of-state immunity for President Jiang.[6] The United States further argued that President Jiang was personally inviolable and, therefore, incapable of being served in any capacity. Specifically, the government argued that President Jiang could not be served as an agent of Office 6/10.

The district court accepted the United States' assertion of head-of-state immunity on behalf of President Jiang and dismissed the appellants' claims against him. The district court rejected, however, the government's argument of personal inviolability. Instead, the district court found that service of process on Office 6/10 could not be achieved through President Jiang because the appellants had not shown that President Jiang was either an agent or an officer of Office 6/10. Further, the district court held that, even assuming service of process on Office 6/10 could be effectuated through President Jiang, it lacked personal jurisdiction to hear claims

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6. The United States included with its motion before the district court a letter from William H. Taft, IV, Legal Adviser to the Department of State to Robert D. McCallum, Jr., an Assistant Attorney General with the Department of Justice. In that letter, Taft stated that "[t]he Department of State recognizes and allows the immunity of President Jiang from this suit."

Further, the United States' "amicus" brief to this court appears to be a collaborative effort of the State Department and the Department of Justice. We take the statements in this brief concerning the potential impact of the current suit to be more than simply the advocacy position of the government. We regard it as the official position of the Executive Branch.

against it. The district court, therefore, dismissed the appellants' complaint in its entirety. This appeal followed.

II.

The appellants raise three issues on appeal. First, they argue that the district court erred when it accepted, as controlling, the United States' assertion of head-of-state immunity on behalf of President Jiang. Second, the appellants argue that the district court erred when it determined that President Jiang could not be served as an agent of Office 6/10. Finally, the appellants argue that the district court erred when it held that it lacked personal jurisdiction over Office 6/10.

A. *Head-Of-State Immunity—Some Background*

The appellants' first argument relates to the assertion by the United States, which the district court took as dispositive, that President Jiang was immune from the appellants' suit. The appellants argue that the actions President Jiang is accused of amount to violations of "*jus cogens*" norms of international law and that immunity may not be conferred upon a person accused of violating these norms.

The Supreme Court recognized the immunity of foreign sovereigns from suits brought in United States courts nearly 200 years ago. In *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice Marshall reasoned that although "the jurisdiction of the United States over persons and property within its territory 'is susceptible to no limitation not imposed by itself,' . . . as a matter of comity,

members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign." *Republic of Austria v. Altmann*, 541 U.S. __, slip op. at 9 (2004) (quoting *McFaddon*, 11 U.S. at 136). Following *McFaddon*, courts have been expected to "defer[ ] to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983).

For most of the next 165 years, the Executive Branch determined whether a foreign nation was entitled to immunity. The practice during this period was that the State Department would provide a court with a "suggestion of immunity." On reception of this "suggestion," courts would dismiss a suit, or any claims brought in a suit, against a foreign nation.

In 1952, the State Department adopted the "restrictive" theory of sovereign immunity. *See Verlinden*, 461 U.S. at 486-87. "Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Id.* at 487. The restrictive theory was often honored in the breach: "On occasion, political considerations led to suggestions of immunity where immunity would not have been available under the restrictive theory." *Id.*

In 1976, Congress enacted the Foreign Sovereign Immunities Act of 1976 (the "FSIA"), 28 U.S.C. §§ 1602 *et seq*. As an initial matter, the FSIA provides a foreign state

with immunity from suit in courts of the United States or of any state. 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) ("Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts. . . ."). Such immunity is subject, however, to international agreements to which the United States was a party in 1976, as well as certain exceptions set forth in the FSIA. *Id.* These exceptions codify the restrictive theory of immunity. The responsibility for determining whether an exception applies is left to the courts. *See United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) ("[The FSIA] codified the State Department's general criteria for making suggestions of immunity, and transferred the responsibility for case-by-case application of these principles from the Executive Branch to the Judicial Branch."). Insofar as a foreign state is concerned, therefore, the pre-1976 practice of courts reflexively deferring to the Executive Branch's immunity determinations has been eliminated.

The FSIA does not, however, address the immunity of foreign heads of states. The FSIA refers to foreign states, not their leaders.[7] The FSIA defines a foreign state to include a political subdivision, agency or instrumentality of a foreign state but makes no mention of heads of state. 28 U.S.C. § 1603(a). Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976—with the Executive Branch. *Noriega*, 117 F.3d at 1212. ("Because the FSIA addresses neither head-of-state immunity,

7. In this way, the FSIA does not recognize (as *McFaddon* clearly did) the classical conflation of a head of state with the state itself (succinctly stated by King Louis XIV of France, "L'etat, c'est moi.").

nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in [*McFaddon*] and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim.").

B. The Present Case

In this case the Executive Branch entered a suggestion of immunity. The appellants argue, however, that the Executive Branch has no power to immunize a head of state (or any person for that matter) for acts that violate *jus cogens* norms of international law. We have explained *jus cogens* norms before:

> A *jus cogens* norm is a special type of customary international law. A *jus cogens* norm " 'is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.'" *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (*quoting* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679). Most famously, *jus cogens* norms supported the prosecutions in the Nuremberg trials. *See Siderman*, 965 F.2d at 715 (9th Cir. 1992) ("The universal and fundamental rights of human beings identified by Nuremberg—rights against

> genocide, enslavement, and other inhumane acts . . .—are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*.").

Sampson v. Federal Republic of Germany, 250 F.3d 1145, 1149-50 (7th Cir. 2001).

The appellants' position, therefore, is that, in at least a particular class of cases (those involving *jus cogens* norms), a court cannot defer to the position of the Executive Branch with respect to immunity for heads of states. The Supreme Court has held, however, that the Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry. *See Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943) ("The certification and the request that the vessel be declared immune *must be accepted by the courts as a conclusive determination* by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.") (emphasis added); *Compañia Española de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) ("If [a claim of immunity by a foreign government] is recognized and allowed by the Executive Branch of the government, *it is then the duty of the courts* to release the vessel upon appropriate suggestion by the Attorney General of the United States, or other officer acting under his discretion.") (emphasis added); *see also Spacil v. Crowe*, 489 F.2d 614, 617 (5th Cir. 1974) ("The precedents are overwhelming. For more than 160 years American courts have consistently applied the doctrine of sovereign immunity when requested to do so by the executive branch. Moreover, they have done so with no further review of the executive's

determination."); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("The State Department is to make [an immunity determination] in light of the potential consequences to our own international position. Hence once the State Department has ruled in a matter of this nature, the judiciary will not interfere."); *Rich v. Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion.") (internal citations omitted).[8]

The appellants present their argument as one of international law—under customary international law, a state cannot provide immunity to a defendant accused of violating *jus cogens* norms. Our first concern, however, is to ascertain the proper relationship between the Executive and Judicial Branches insofar as the immunity of foreign leaders is

8. As the foregoing citations show, many cases concerned with foreign sovereign immunity involve libel actions or other actions involving commercial marine vessels rather than a head of state. This distinction does not make a difference to the question at issue: whether a suggestion of immunity by the Executive Branch is dispositive. These authorities support the conclusive nature of the Executive Branch's determination of immunity with regard to heads of state. Courts appropriately accept an immunity determination as conclusive when it involves ships out of concern that the court might otherwise interfere with the foreign policy objectives of the Executive Branch. Clearly such concerns would be greater when the suggested immunity involves a foreign leader.

concerned. The obligation of the Judicial Branch is clear—a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff. *See Spacil*, 489 F.2d at 618 ("[W]e are analyzing here the proper allocation of functions of the branches of government in the scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

Our deference to the Executive Branch is motivated by the caution we believe appropriate of the Judicial Branch when the conduct of foreign affairs is involved. *Cf. Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("[I]t is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.' ") (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)); *Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy."). The determination to grant (or not grant) immunity can have significant implications for this country's relationship with other nations. A court is ill-prepared to assess these implications and resolve the competing concerns the Executive Branch is faced with in determining whether to immunize a head of state. *Spacil*, 489 F.2d at 619 ("[T]he degree to which granting or denying

a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive. The executive's institutional resources and expertise in foreign affairs far outstrip those of the judiciary.").

Although our decision in *Sampson* was one of statutory interpretation, we believe it is also instructive here. In *Sampson* we held that the FSIA did not include an implied exception[9] to its general grant of sovereign immunity to foreign states where a foreign state was accused of violating *jus cogens* norms.[10] *Id.* at 1156. Because the FSIA contained no such exception, Germany was immune from suit brought by a survivor of Auschwitz in the Northern District of Illinois.

Our interpretation of the FSIA confirmed that Congress could grant immunity to a foreign state for acts that amounted to violations of *jus cogens* norms. Just as the FSIA is the Legislative Branch's determination that a nation should be immune from suit in the courts of this country, the immunity of foreign leaders remains the province of the Executive Branch. The Executive Branch's determination that a foreign leader should be immune from suit even when the leader is

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9. Section 1605(a)(1) of the FSIA provides an exception to a nation's sovereign immunity in cases where a "foreign state has waived its immunity . . . by implication."

10. At least three other circuits have reached a similar conclusion. *See Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir. 1997); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992).

accused of acts that violate *jus cogens* norms is established by a suggestion of immunity. We are no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state. *Cf. Hoffman*, 324 U.S. at 35 (1945) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."). Pursuant to their respective authorities, Congress or the Executive Branch can create exceptions to blanket immunity. In such cases the courts would be obliged to respect such exceptions. In the present case the Executive Branch has recognized the immunity of President Jiang from the appellants' suit. The district court was correct to accept this recognition as conclusive.

C. *Service of Process on President Jiang to Reach Third Parties*

We turn next to Office 6/10. The appellants maintain that service on Office 6/10 was complete when President Jiang was served during his stay in Chicago. As recounted above, the United States argues that President Jiang's immunity extends to service aimed not at him, but at a third party.

The district court rejected the United States' immunity argument but, nonetheless, held that service on President Jiang was insufficient to reach Office 6/10 because the appellants had provided only conclusory evidence that President Jiang was, at the time of service, an officer or agent of Office 6/10. The district court also held that "even if Jiang

was an agent or officer of Office 6/10 and thus capable of receiving service on its behalf, such service was insufficient to confer personal jurisdiction over Office 6/10 because the Office is not subject to the jurisdiction of Illinois courts."

Although the district court reached the correct result, it erred when it rejected the United States' argument concerning the scope of President Jiang's immunity. Because the Executive Branch has recognized President Jiang's immunity from suit, President Jiang could not be used as an involuntary agent of the appellants to effect service on Office 6/10. We need not therefore consider whether President Jiang was acting as an agent or officer of Office 6/10 or whether the district court had personal jurisdiction over Office 6/10.

We agree with the Executive Branch that its power to recognize the immunity of a foreign head of state includes the power to preclude service of process in that same suit on the head of state even where that service is intended to reach third parties.

Recognizing the immunity of a head of state and precluding service of process on a head of state are motivated by the same concern for the effective conduct of this nation's foreign affairs. As emphasized above, this responsibility is left to the political branches of this government. The Executive Branch has represented to this court that permitting service of process is often viewed by foreign governments and their heads of state "as an affront to the dignity of both the leader and the state." The Executive Branch has also indicated that "the potential for insult is the same, regardless of whether the service relates to the visiting

head of state himself, or to service on the visiting leader in some purported representational or agency capacity." Finally, the Executive Branch has indicated that "[s]uch attacks on the dignity of a visiting head of state can easily frustrate our President's ability to reach this Nation's diplomatic objectives. . . ." The deference we extend the Executive Branch with regard to its determination of immunity, see pages 8-13 *supra*, is equally appropriate here. The Executive Branch is better equipped than this court or the district court to assess the consequences for our foreign policy of permitting service of process on visiting heads of state, and it is the Executive Branch in its dealings with China that will confront, in the first instance, the consequences of that determination.[11] *Cf. Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980-81 (D.C. Cir. 1965) (holding that the Ambassador of Tunisia was not properly subject to service directed to Tunisia after the State Department informed the court that "service would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions."); *see also Spacil*, 489 F.2d at 619 ("[I]n the chess game that is diplomacy only the executive has a view of the entire board and an understanding of the relationship between isolated moves. Will granting immunity serve as a bargaining counter in complex diplomatic negotiations? Will it preclude a significant diplomatic advance; perhaps a detente between this country and one with whom we are not on the best speaking terms? These are questions for the executive, not the judiciary.") (internal citation omitted).

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11. We want to emphasize the narrow reach of our holding. We are not holding (and the United States did not argue) that Office 6/10 is entitled to immunity from this suit. That issue is not before this court. We hold only that service on Office 6/10 could not be effectuated by service on President Jiang.

Also important to our decision is the treatment accorded the President of the United States in his travels abroad. The Executive Branch has stated that it would be a "great offense if foreign states and their courts were to encourage process servers to hound our President when he is abroad to conduct important negotiations with his foreign counterparts." Such concerns must weigh heavily in our determination that service of process should not be permitted on foreign heads of state visiting this country in the circumstances of this case.

The district court pointed to three factors when it rejected the United States' argument. First, the district court reasoned that service on a head of state where that service is directed towards a third party does not implicate the justifications for inviolability and immunity to the same degree as service on a head of state when that service is directed towards the head of state himself. As we have just stated, however, we believe the Executive Branch is better equipped to make that determination.

Second, the district court noted that "the service provisions of the FSIA suggest that personal inviolability does not present an absolute bar to service in an agency capacity." The district court reasoned that "[b]ecause the FSIA does not foreclose the possibility that a diplomat may receive process as an agent, the statute lends weight to the proposition that inviolability does not bar service under all circumstances."

We are not concerned here, however, with "all circumstances" or whether there is an "absolute bar" to

service of process on a diplomat or a head of state. We are concerned only with a narrow set of circumstances—whether a head of state may be the subject of service directed at a third party where the United States has recognized that head of state's immunity from suit in the action the service is related to, and the Executive Branch has indicated that permitting service would have a deleterious effect on the conduct of foreign affairs. There may be circumstances where it is permissible to serve a visiting head of state. For instance, the Executive Branch may not choose to recognize the immunity of a visiting head of state. In that case, service of process on the head of state would be permissible to reach the head of state himself and would, we suggest, be permissible where the service of process is also aimed at a third party (assuming, of course, an agency or similar relationship between the head of state and the third party).

The third factor cited by the district court is that "heads of state may not be immune in all situations." Citing *McFaddon*'s discussion of the exceptions to the immunity of foreign heads of state, *see McFaddon*, 11 U.S. at 145, the district court held that "[t]hese limited exceptions to immunity presuppose that a head of state is amenable to service of process, even in instances when his presence in court may be required. Service of process therefore cannot be seen under all circumstances to be an affront to a head of state's inviolability."

The district court is correct that there are exceptions to the immunity a head of state (as well as a foreign nation) is granted in this country's courts. As we have discussed above, however, and the district court recognized elsewhere in its

opinion, the determination that these exceptions apply to a head of state is left to the Executive Branch.[12] Likewise, the determination that service in the circumstances of this case would be detrimental to the Nation's foreign policy should be left to the Executive Branch.

III.

In this case the Executive Branch has recognized President Jiang's immunity from the appellants' suit. We are required to defer to the decision of the Executive Branch. The Executive Branch has also determined that service of process by the appellants on President Jiang in order to reach an intended co-defendant in the same suit could frustrate this Nation's diplomatic objectives. It is appropriate to defer to that decision as well. Because we do so, service on Office 6/10 could not be effectuated through President Jiang. We need not reach, therefore, the question of whether President Jiang was, at the time of service, an officer or agent of Office 6/10 or whether the district court had personal jurisdiction over Office 6/10.

We conclude by stating that we are not unsympathetic to the appellants' claims. For the reasons stated above, however, we cannot permit this suit to go forward. The Executive Branch has stated it is working to persuade the government of China to put an end to the human rights violations it has inflicted on its people for more than half a century. Success depends on diplomacy, not United States courts.

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12. Under the FSIA, whether an exception applies is determined by the Judicial Branch. As we have discussed, however, the FSIA does not apply to heads of state.

Appendix A

AFFIRMED

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED OCTOBER 6, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 02 C 7530

PLAINTIFFS A, B, C, D, E, F, and OTHERS SIMILARLY SITUATED, WEI YE, and HAO WANG,

Plaintiffs,

vs.

JIANG ZEMIN and FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10),

Defendants.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Plaintiffs have moved for reconsideration of the Court's memorandum opinion and order of September 12, 2003, in which we dismissed the claims against defendant Jiang Zemin, the former head of state of the Peoples Republic of China, based on a showing of immunity from suit, and dismissed the claims against the Falun Gong Control Office,

also known as Office 6/10, for lack of personal jurisdiction. Plaintiffs have also moved for leave to reopen the case and file an amended complaint. Familiarity with the September 12 ruling is assumed. *Plaintiffs A, B, C, D, E, F v. Jiang Zemin*, No. 02 C 7530, ____ F. Supp. 2d ____, 2003 WL 22118924 (N.D. Ill. Sept. 12, 2003).

1. Motion to reconsider

"Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence." *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251 (7th Cir. 1987). Plaintiffs' arguments that the Court improperly held that Jiang was entitled to immunity are essentially a rehash of their prior arguments to this effect, made to show that the Court's reasoning was ill-founded. *See* Pltf. Mem. in Supp. of Mot. to Reconsider, args. IV, VI, and VII (there is no argument V). Such arguments are not a proper basis for a motion to reconsider. Reconsideration is appropriate only when "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). Additionally, it appears that certain of the points made in these parts of plaintiffs' memorandum are newly-made arguments that were available to plaintiffs at the time of their prior, very comprehensive brief (45 pages with 29 small-type footnotes). To that extent, the motion is likewise improper. *See United States v. 47 West 644 Route 38, Maple Park, Illinois*, 190 F.3d 781, 783 (7th Cir. 1999) ("A party may not introduce evidence or make

arguments in a Rule 59 motion that could or should have been presented to the court prior to judgment.")

Plaintiffs' challenge to the Court's comments regarding Office 6/10's possible entitlement to immunity under the Foreign Sovereign Immunities Act is not a basis for reconsideration. *See* Pltf. Mem. in Supp. of Mot. to Reconsider, arg. III. The Court made no finding in that regard, and the comments in question formed no part of the basis for the decision.

Plaintiffs also argue that the Court should not have considered whether personal jurisdiction existed as to Office 6/10, as that entity filed no papers and thus waived any objection to personal jurisdiction. *See* Pltf. Mem. in Supp. of Mot. to Reconsider, arg. II.B. This objection has itself been forfeited. In a heading to a section of their previously-referenced brief discussing both subject matter jurisdiction and personal jurisdiction, plaintiffs conceded that "[c]hallenges to the District Court's jurisdiction may be raised either by a party *or by the court* upon the filing of a motion for default judgment." Pltf. Mem. on Prelim. and Jurisd. Issues at 1 (emphasis added). And they failed to press the waiver argument that they now make. In any event, it is well established that a Court may (and perhaps must) consider the issue of personal jurisdiction *sua sponte* when addressing imposition of a default. *See, e.g., System Pipe & Supply, Inc. v. M/V Viktor Kurnatovskiy*, 242 F.3d 322, 324 (5th Cir. 2001); *Tuli v. Republic of Iraq (In re Tuli)*, 172 F.3d 707, 712 (9th Cir. 1999); *Dennis Garberg & Associates, Inc. v. Pack-Tech International Corp.*, 115 F.3d 767, 771-72 (10th Cir. 1997).

Appendix B

Plaintiffs argue that the Court improperly ruled that "nationwide contacts" jurisdiction under Fed. R. Civ. P. 4(k)(2) was unavailable; they say that the Court improperly shifted to plaintiffs the burden of showing that jurisdiction was lacking in all state courts. *See* Pltf. Mem. in Supp. of Mot. to Reconsider, arg. II.A (citing *SI International, Inc. v. Borden Ladner Gervais LLP*, 256 F.3d 538, 552 (7th Cir. 2001)). But in this case plaintiffs *conceded* that jurisdiction over both Jiang and Office 6/10 existed in other states, *see* Pltf. Mem. on Prelim. and Jurisd. Issues at 44, and thus there was no need to deal with the allocation of the burden of proof.

Finally, plaintiffs challenge the Court's finding that they had insufficiently alleged that Jiang was an agent or officer of Office 6/10 at the time of the purported service, as required for service under the pertinent Illinois statute and Fed. R. Civ. P. 4(e)(1) & 4(h)(1). *See* Pltf. Mem. in Supp. of Mot. to Reconsider, arg. I. First of all, the Court's statement was at most an alternative basis for our holding that personal jurisdiction was lacking.[1] In any event, however, plaintiffs' arguments are unconvincing and do not persuade the Court that it erred in stating that "plaintiffs' conclusory allegations of agency" did not provide a sufficient basis for a determination in their favor on the agency issue. *See* 2003 WL 22118924, at *8.

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1. For this reason, plaintiffs' proposed amendments to their complaint's allegations regarding Jiang's agency status would not warrant reopening the judgment even were the Court to grant leave to amend.

Appendix B

2. Motion for leave to reopen judgment and amend complaint

Plaintiffs are not entitled to amend their complaint. The amendment is based on information that was available to them prior to the time of the Court's ruling, *see* Decl. of Terri E. Marsh, intro. par., and thus a post-judgment motion is untimely.

Conclusion

For the reasons stated above, the Court denies plaintiffs' motion to reopen the judgment and amend the complaint, and their motion to alter or amend the judgment.

s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: October 6, 2003

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED SEPTEMBER 12, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 02 C 7530

PLAINTIFFS A, B, C, D, E, F, and OTHERS SIMILARLY SITUATED, WEI YE, and HAO WANG,

Plaintiffs,

vs.

JIANG ZEMIN and FALUN GONG CONTROL OFFICE (A.K.A. OFFICE 6/10),

Defendants.

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Plaintiffs are practitioners of Falun Gong, a spiritual movement of Chinese origin, and are either current or past residents of China.[1] Defendants are Jiang Zemin, the former

1. By request of certain plaintiffs, alphabetic designations have been used as a substitute for their names in the caption of this lawsuit. They sought this measure to protect them and their families, some of whom remain in China, from reprisal for filing this action.

President of the People's Republic of China, and the Falun Gong Control Office, an agency Jiang allegedly established for the purpose of suppressing the Falun Gong movement. The complaint alleges horrific human rights abuses suffered by plaintiffs A, B, C, D, E, and F at the hands of Chinese officials carrying out the dictates of the Falun Gong Control Office. Plaintiffs Wei Ye, a Chinese citizen residing in Illinois, and Hao Wang, a United States citizen residing in Massachusetts, allege defendants violated 42 U.S.C. § 1985 by attempting to obstruct their attempts to travel from the United States to Iceland in June 2002. Plaintiffs allege that defendants did so in order to prevent them from attending protests against China's persecution of Falun Gong practitioners during Jiang Zemin's visit to Iceland.

Plaintiffs contend that the Court has jurisdiction of the case pursuant to the Alien Tort Claim Act, 29 U.S.C. § 1350, which confers original jurisdiction in the district courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] They maintain that jurisdiction exists because they allege violations of both customary international law and *jus cogens* norms as well as treaties the United States has ratified. Specifically, the complaint contains claims for

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2. Plaintiffs maintain that jurisdiction also exists by virtue of the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), codified at 28 U.S.C. § 1350 note. The TVPA is not, however, a jurisdictional statute. *Cf. Al Odah v. United States*, 321 F.3d 1134, 1146 (D.C. Cir. 2003) ("The Torture Victim Act does not contain its own jurisdictional provision."). Rather, the statute creates a cause of action for torture and extrajudicial killings. H.R. Rep. No. 102-367, pt. 1, at 3 (1991).

torture; genocide; violation of the right to life; violation of the right to liberty and security of the person; arbitrary arrest and imprisonment; violation of the right to freedom of thought, conscience, and religion; and conspiracy to commit violations of civil rights within the United States.

Defendants have not responded to the complaint, and plaintiffs have moved for entry of an order of default. The case is before the Court for consideration of preliminary jurisdictional matters. The United States government has intervened as an *amicus curiae* pursuant to 28 U.S.C. § 517, which permits the government to "attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." In its *amicus* submission, the government suggests that Jiang is immune from suit based on his status as China's former head of state. Alternatively, the government urges the Court to vacate an order entered by another judge of this Court, acting as emergency judge, which authorized plaintiffs to serve Jiang by alternate means, or to quash service because of alleged defects. Thirty-eight members of the United States Congress have also submitted an *amicus* brief urging the Court to exercise jurisdiction over defendants.

BACKGROUND

The complaint alleges the following factual background. In March 1993, defendant Jiang assumed the offices of President of the People's Republic of China and Chair of the country's Central Military Committee. In 1997, he also became the Secretary General of the Central Committee of

the Chinese Communist Party, which for over fifty years has been the dominant political party in China.[3] In November 2002, Jiang resigned his post as head of the Party, and on March 15, 2003, he stepped down as president of China

Plaintiffs contend that in June 1999, Jiang embarked on a campaign to eliminate the practice of Falun Gong in China. To this end, on June 10, 1999 Jiang established the Falun Gong Control Office, which plaintiffs claim is a subdivision of the Chinese Communist Party. They claim Jiang created this entity, known as "Office 6/10" in commemoration of the date of its inception, to organize and direct the suppression of Falun Gong throughout China. Office 6/10 has local branches in each province and city of China. Plaintiffs allege that according to the charter of one local office, the regional branches' responsibilities include "implement[ing] the decisions from the Central Committee of the Chinese Communist Party regarding preventing and dealing with Falun Gong and other evil cults." Compl. ¶ 30 (quoting local charter) (internal quotation marks omitted). In July 1999, Jiang is claimed to have issued an edict outlawing Falun Gong as a threat to the Chinese government and people and ordering it suppressed by any means. Plaintiffs allege that he caused the Ministry of Public Security to issue a list of prohibitions that made illegal many activities engaged in by Falun Gong practitioners, including speaking out in defense of the movement. Jiang also allegedly ordered China's legislative body, the National People's Congress, to

3. Most Americans believe, or at least assume, that the Chinese Communist Party is the only political party in China, but an affidavit from an American scholar on China submitted by plaintiffs suggests that this is not so. Aff. of Andrew Nathan ¶ 4.

pass a series of retroactive laws ostensibly legitimizing this crackdown. Plaintiffs allege that the suppression has been marked by atrocities—arrest without trial, execution, rape, disappearance, forced labor in work camps, and torture of thousands of Falun Gong practitioners.

Plaintiffs filed this lawsuit under seal on October 18, 2002. Knowing that Jiang would be visiting Chicago on October 22 and 23, 2002, plaintiffs moved *ex parte* for leave to effect service on defendants by alternate means. Judge William J. Hibbler, acting as emergency judge in our absence, granted the motion and entered an order permitting service to be achieved by delivering a copy of the summons and complaint "to any of the security agents or hotel staff helping to guard" Jiang during his stay in Chicago. Order of Oct. 21, 2002. Plaintiffs contend that they properly effectuated service by delivering the documents to a Chicago Police commander stationed at Jiang's hotel and to agents of the United States Secret Service assigned to guard Jiang.

DISCUSSION

A. Head-of-State Immunity

In its *amicus* submission, the government suggests that Jiang is immune from the jurisdiction of the Court because he is China's former head of state. Citing Supreme Court precedent that the Court discusses below, the government maintains that courts are bound by the Executive Branch's determinations of immunity. Plaintiffs argue that although such deference was once the rule, courts are no longer bound by suggestions of immunity and that immunity is not

appropriate in this case because head-of-state immunity does not shield former heads of state.

The enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1602 *et seq.*, altered the practice of court deference to the Executive Branch's immunity suggestions on behalf of foreign states. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). Whereas under traditional practice immunity determinations were made by the Executive Branch, the FSIA placed that responsibility—at least with regard to states—in the courts. 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States. . . ."). Although plaintiffs acknowledge that the FSIA does not govern the immunity claims of individuals, they maintain that "the principle embodied in the FSIA to treat [immunity] claims through the judicial process rather than diplomatically [also applies] to immunity claims raised by government officials." Pls.' Mem. on Preliminary and Jurisdictional Issues at 2 (hereinafter Pls.' Mem.).

The Court has recently considered the deference that must be accorded the Executive Branch's suggestions of immunity for heads of state as well as the effect that the FSIA's enactment had on the immunity-suggestion procedure. The following discussion is taken largely from the Court's opinion in *Abiola v. Abubakar*, 267 F. Supp. 2d 907 (N.D. Ill. 2003).

Under traditional common law, a foreign head of state was absolutely immune from suit in United States courts. The Supreme Court articulated this principle of customary

international law in its 1812 decision, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).[4] Although *The Schooner Exchange* held merely that an armed ship of a friendly foreign state was exempt from the jurisdiction of United States courts, the decision "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden*, 461 U.S. at 486. Sovereign immunity was premised on the notions of comity and the equal dignity of nations. A ruler could not be seen to "degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 137. A head of state's immunity was premised on the concept that a foreign state and its ruler were one and the same; the "prince" was deemed to be the personification of the sovereign state. *The Schooner Exchange* reflects this conflation; throughout the opinion Chief Justice Marshall makes no distinction between the sovereign as state and the sovereign as ruler.

As the principles articulated in *The Schooner Exchange* evolved into a general doctrine of foreign sovereign immunity, the courts consistently "deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden*, 461 U.S. at 486. The Supreme Court articulated the rationale for such deference:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction

4. The Supreme Court did, however, leave open the possibility that a "prince" may not be immune for his purely private ventures. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 145.

> . . . , that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. "In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.

Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). Thus emerged a system under which the State Department determined the availability of sovereign immunity, and the courts deferred to its decisions. *Verlinden*, 461 U.S. at 487.

Until 1952, the State Department "ordinarily requested immunity in all actions against friendly foreign sovereigns." *Id.* at 486. In that year, however, the State Department adopted the "restrictive theory" of immunity, under which the Executive Branch would recognize immunity only for a foreign sovereign's public acts, not its commercial or private activities. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in Alfred Dunhill v. Republic of Cuba*, 425 U.S. 682 (1976). The practical application of the restrictive theory proved troublesome, however. *Verlinden*, 461 U.S. at 487. Foreign states faced with litigation in United States courts often exerted diplomatic pressure on the State Department, which resulted

in inconsistent, and sometimes embarrassing, outcomes. In 1976, Congress passed the FSIA to "free the Government from case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.' " *Id.* at 488 (quoting H.R.Rep. No. 94-1487, at 7 (1976) (hereinafter H.R. Rep.)) (alterations in original). The FSIA did so by transferring immunity determinations for states from the State Department to the courts. *See* 28 U.S.C. § 1602 (findings and declaration of purpose).

Plaintiffs maintain that although the FSIA does not apply to heads of state, the statute's elimination of the immunity-suggestion procedure for foreign states also displaced the suggestion procedure for heads of state. Plaintiffs thus urge the Court to make an independent determination regarding the availability of immunity for Jiang rather than defer to the Executive Branch's suggestion.

Neither the FSIA's text nor its legislative history, however, indicates an intent to alter the traditional suggestion procedure with respect to heads of state. The FSIA's definition of "foreign state" noticeably omits heads of state. "Foreign state" is defined to include an "agency or instrumentality of a foreign state," which is further defined as "any *entity* (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b) (emphasis added). The House Report's discussion of the definition of "foreign

state" further underscores the Act's applications to state *qua* state and state entities, not heads of state. The FSIA's reference to a foreign state's "agency or instrumentality" is meant to cover

> a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. at 16. Although the term "foreign state" is thus to be read broadly enough to cover such entities, there is no indication that heads of state are to be included in the definition.[5] Moreover, the Act's legislative history indicates that it was not meant to affect diplomatic or consular immunity: "Section 1605(a)(5) would not govern suits against diplomatic or consular representatives but only suits against the foreign state." H.R. Rep. at 21.

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5. In fact, references in the legislative history suggest that the opposite is true. During Congressional deliberations on the FSIA, a witness from the Department of Justice described how the proposed legislation would enable suits against foreign state-owned enterprises—such as Lufthansa, West Germany's national airline. Notably, however, he emphasized, "Now we are not talking, Congressmen, in terms of permitting suit against the Chancellor of the Federal Republic. . . . That is an altogether different question." Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary, 93d Cong. 16 (1976) (statement of Bruno Ristau, Chief, Foreign Litigation Unit, Civil Division, Department of Justice).

Appendix C

It is logical to infer from the FSIA's legislative history and the omission of heads of state from the definition of "foreign state" that the statute was not intended to alter traditional immunity for heads of state. *See Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 277 (S.D.N.Y. 2001) ("With a legislative record devoid of any explicit contrary expression, a deliberate purpose to depart from generally prevalent international customs and practices as regards immunity for heads-of-state should not be ascribed to Congress."). The pre-1976 suggestion of immunity procedure thus survives the statute's enactment with respect to heads of state. The Court must defer to the United States's suggestion of immunity for Jiang, *Republic of Mexico*, 324 U.S. at 35, and we therefore dismiss all claims made by the plaintiffs against him.

In reaching this determination, we join several courts that have concluded that the immunity-suggestion procedure remains intact with respect to heads of state. *See United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) ("Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlines in *The Schooner Exchange* and its progeny. As a result, this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim."); *Leutwyler v. Office of her Majesty Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277, 280 (S.D.N.Y. 2001) (dismissing all claims against Queen Rania because the government filed a suggestion of immunity); *Tachiona*, 169 F. Supp. 2d at 290 ("[T]he Executive Branch's role in determinations of head-of-state

immunity was not affected by the passage of the FSIA."); *First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996) ("[T]he enactment of the FSIA was not intended to affect the power of the State Department . . . to assert immunity for heads of state or for diplomatic and consular personnel."); *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) ("The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state."); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (dismissing claims against King Fahd because the United States intervened to acknowledge his status as head of state), *aff'd*, 79 F.3d 1145 (5th Cir. 1996) (unpublished table decision); *Kline v. Kaneko*, 535 N.Y.S. 2d 303, 304 (N.Y. Sup. Ct. 1988) ("The FSIA made no change . . . in the State Department's power to suggest immunity for foreign heads of state. . . ."; dismissing suit against wife of Mexican president because State Department suggested immunity); *see also Kadic v. Karadzic*, 70 F.3d 232, 248 (2d Cir. 1995) (declining to extend head-of-state immunity to defendant where the Executive Branch refused to acknowledge immunity).

Although the Court finds the government's suggestion of immunity dispositive, we nevertheless address plaintiffs' arguments as to why immunity should not be recognized in this case. First, plaintiffs argue that because the government has accepted the role of *amicus curiae*, its assertion of immunity should not be given the deference that courts have traditionally afforded "Official Suggestions of Immunity." Pls.' Mem. at 36. The Court, however, fails to see—and

plaintiffs have not cited any persuasive authority to support—the significance of this distinction. The government has intervened in this litigation pursuant to 28 U.S.C. § 517, which permits a delegate of the Attorney General "to attend to the interests of the United States." The statute ensures an avenue for the interests of the United States to be heard in cases where the government is not a party, but it does not mandate a specific form of intervention. To suggest that the government's *amicus* brief does not have the same status as a suggestion of immunity is to elevate formality over function. The United States's brief *is* a suggestion of immunity. Even if the brief were not clearly marked as a suggestion of immunity, which it is, its content makes amply clear that the Executive Branch, via the State Department, has recognized Jiang's head-of-state immunity and urges the Court to dismiss the claims against him for this reason. *See*, *e.g.*, Corrected United States Statement of Interest, Ex. E (Letter from William H. Taft IV, Legal Adviser, Department of State, to Robert D. McCallum, Jr., Assistant Attorney General (Dec. 6, 2002)) ("The Department of State recognizes and allows the immunity of President Jiang from this suit.").

Plaintiffs also contend that head-of-state immunity does not shield former heads of state. Although Jiang may at one time have enjoyed head-of-state immunity, they argue, he no longer has this protection because he is no longer China's head of state. In support of this argument, plaintiffs rely on the policy behind head-of-state immunity. They contend that the government recognizes the immunity of foreign heads of state to ensure that United States officials "will not be unnecessarily subjected to litigation in the courts of foreign

states by making their counterpart[s] immune" from litigation in our courts. Pls.' Mem. at 29-30. They maintain that the purpose of head-of-state immunity is "to avoid the disruption of foreign relations" a purpose which they claim is "not relevant after a head of state leaves office"—and that insofar as head-of-state immunity exists to avoid "potential embarrassment to the U.S. Government in the carrying out of our foreign policy," this justification "disappears when the foreign official in question leaves office, since the basis for producing conflict with foreign policy considerations is eliminated at that point." *Id.* at 31.

Plaintiffs cite no holding by any court that head-of-state immunity for acts committed during one's tenure as ruler disappears when a leader steps down. The Second Circuit has stated in *dictum* that "there is respectable authority for denying head-of-state immunity to former heads-of-state." *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988). However, the cases the court cited in support of this proposition suggest merely that a former head of state may not be entitled to immunity (1) for his private acts, *see The Schooner Exchange*, 11 U.S. (7 Cranch) at 145; *Republic of Philippines v. Marcos*, 806 F.2d 344, 360 (2d Cir. 1986) (stating in dicta that head-of-state immunity may not "go [ ] so far as to render a former head of state immune as regards his *private* acts" (emphasis added)), or (2) when the foreign state waives the immunity of its former leader, *see In re Grand Jury Proceedings*, 817 F.2d 1108, 1111 (4th Cir. 1987). Neither scenario is present here. Moreover, the cornerstones of foreign sovereign immunity, comity and the mutual dignity of nations, are not implicated by denying immunity in the types of matters cited in *Doe*—in the first scenario because the head of state is

being sued for acts taken as a private person and in the second because the foreign state disavows immunity for its former leader. By contrast, the rationale for head-of-state immunity is no less implicated when a former head of state is sued in a United States court for acts committed while head of state than it is when a sitting head of state is sued.

Plaintiffs also contend that immunity should not be recognized in the context of the types of wrongs alleged in their complaint. Violations of *jus cogens* norms, they maintain, are outside the scope of immunity protections. However, the opposite actually seems to be true. At common law, heads of state and foreign states enjoyed coextensive immunity until the FSIA limited the situations in which immunity would be recognized for states. *Abiola*, 267 F. Supp. 2d at 911-14. A head of state, like the state itself, can therefore be understood to enjoy any immunity that states retain after the FSIA's enactment. *Id.* at 916. States are immune from claims arising from the alleged "abuse of the power of [a state's] police" because, "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Saudi Arabia v. Nelson*, 507 U.S. 349, 361 (1993). *A fortiori*, the same is true for a head of state.

B. Defendant Falun Gong Control Office

The Court now considers whether this lawsuit can proceed against the defendant Falun Gong Control Office.

Appendix C

1. Inviolability

Plaintiffs argue that even if head-of-state immunity shields Jiang from the Court's jurisdiction, such protection does not extend to the Falun Gong Control Office, which—they claim—was properly served with process through service on Jiang. The government maintains that because Jiang enjoys head-of-state immunity, he is personally inviolable and thus incapable of being served in any capacity. It argues that for this reason, Jiang could not properly be served as an agent for Office 6/10.

Personal inviolability is a core attribute of diplomatic immunity. Satow's Guide to Diplomatic Practice 120 (Lord Gore-Booth ed., 5th ed. 1979) (hereinafter Satow's Guide) ("Personal inviolability is of all the privileges and immunities of missions and diplomats the oldest established and the most universally recognized. . . ."). The Vienna Convention on Diplomatic Relations provides that "[t]he person of a diplomatic agent shall be inviolable." Vienna Convention on Diplomatic Relations, art. 29, *done* Apr. 18, 1961, *United States accession*, Dec. 13, 1972, 23 U.S.T. 3227, 500 U.N.T.S. 95 (hereinafter Vienna Convention). And a visiting head of state is "given the same personal inviolability .. . [as] an accredited diplomat." Restatement (Third) of Foreign Relations Law § 464, note 14 (1987). According to the Vienna Convention, inviolability means that the "diplomatic agent . . . shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." Vienna Convention, art. 29. This articulation of the principle is consistent with its

origins—a diplomat serving his country on potentially hostile foreign territory required personal inviolability "to allow him to perform his functions without any hindrance from the government of the receiving state." Satow's Guide at 120-21. In addition to arrest and detention, the case law addressing inviolability involves, for example, searches of the person, baggage or premises; subpoenas to provide evidence at legal proceedings; and initiation of criminal or civil proceedings against a diplomat who claims immunity. *See Tachiona*, 169 F. Supp. 2d at 304.

The question in this case is whether this inviolability is broad enough to insulate Jiang from all service of process, even process directed at a third party entity with which he is claimed to be associated. Several factors lead the Court to conclude that inviolability does not operate as a barrier to service of process in such a situation. First, the justifications for inviolability and immunity—that a foreign diplomat should not be hindered in his official functions and that a foreign nation should not suffer an affront to its dignity—are clearly implicated if legal compulsion is asserted directly against a head of state. But these concerns are not implicated to the same degree when service of process is related, not to the assertion of jurisdiction over the head of state himself, but to jurisdiction over a third-party organization. *Cf. Tachiona*, 169 F. Supp. 2d at 305 ("Service of process . . . would not demand the official's appearance in court nor subject him in other ways to the court's compulsory powers in a manner that could be deemed an assertion of territorial authority over the foreign dignitaries and, by extension, over the foreign state they represent.").

Second, the service provisions of the FSIA suggest that personal inviolability does not present an absolute bar to service in an agency capacity. The Act provides that one way to effect service on an agency or instrumentality of a foreign state is "by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States." 28 U.S.C. § 1608(b)(2). Nothing in the statute would prevent service to be effected through an officer who "also happens to be a state official or diplomat otherwise entitled to immunity—theoretically including even a head-of-state who satisfies the statutory criteria defining the persons upon whom service is authorized to be made." *Tachiona*, 169 F. Supp. 2d at 306. Because the FSIA does not foreclose the possibility that a diplomat may receive process as an agent, the statute lends weight to the proposition that inviolability does not bar service under all circumstances.

And perhaps the strongest indication that inviolability does not always preclude service is the possibility that heads of state may not be immune in all situations. As far back as 1812 the Supreme Court, when articulating the principle of sovereign immunity in *The Schooner Exchange*, indicated the possibility that, although a prince was absolutely immune for his official acts, he could be subject to suit for certain private acts: "A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exchange*, 11 U.S. (7 Cranch) at 145. Likewise, international

law permits actions against heads of state involving real property abroad, private services as an executor of an estate, or personal commercial activities. *See* Vienna Convention, art. 31; Satow's Guide at 10. These limited exceptions to immunity presuppose that a head of state is amenable to service of process, even in instances when his presence in court may be required. Service of process therefore cannot be seen under all circumstances to be an affront to a head of state's inviolability.

2. Service on Office 6/10

Although inviolability does not necessarily prevent service on Jiang in an agency capacity, that does not resolve the matter. Jiang could be properly served on behalf of Office 6/10 only if he was an officer or agent of that entity. Federal Rule of Civil Procedure 4(h) provides that service on a foreign corporation or unincorporated association can be effected either "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process," or pursuant to the law of the state in which the district court is located. Fed. R. Civ. P. 4(h)(1); *see also* Fed. R. Civ. P. 4(e)(1). Under Illinois law, a private corporation may be served "by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State." 735 ILCS 5/2-204. The burden for serving an unincorporated association—which is defined as "any organization of 2 or more individuals formed for a common purpose, excluding a partnership or corporation," 735 ILCS 5/2-209.1—is somewhat different. Service on an association can be achieved "by leaving a copy

of the process with any officer of the association personally or by leaving a copy of the process at the office of the association with an agent of the association." 735 ILCS 5/2-205.1. Under this provision, service on any agent of Office 6/10 is insufficient; rather, service must be effected through an officer.

It is not clear whether Office 6/10 should be viewed as a corporate entity or an unincorporated association—though the latter category would appear to be closer to the mark. We therefore address whether Jiang was either an officer or an agent of Office 6/10, as required by the two Illinois statutes we have cited, or a "managing or general agent" or an agent authorized by appointment or law to receive service, as permitted by Rule 4(h). Plaintiffs maintain that Jiang properly could receive service on Office 6/10's behalf because he "was the head of the Communist Party, a member of the Politburo of the Party, and the founding official who established Office 6/10 as an entity of the Party and who provided ongoing oversight and direction for its work." Pls.' Mem. at 43. Throughout the plaintiffs' submissions, they assert that Jiang, by virtue of his role as head of the Chinese Communist Party, controlled and supervised the activities of Office 6/10. *See, e.g., id.* at 42 (Office 6/10 was "subject to the control and supervision of Jiang as head of [the Communist] party."); Compl. ¶ 40 (As Secretary General of the Central Committee of the Chinese Communist Party, Jiang "exercised command authority over" Office 6/10.). Plaintiffs also maintain that, when served, Jiang was present in Chicago as "an agent of his political party's Office 6/10." Compl. ¶ 8.

These submissions, however, do not amount to a showing that Jiang was either an agent or an officer of Office 6/10. The claim that Jiang established the Office and exerted control over it in his capacity as leader of the ruling party does not by itself mean that he was, at the time process was supposedly served, an agent or an officer of the Office. Without something more definitive than plaintiffs' conclusory allegations of agency, the Court cannot determine whether Jiang was in fact an agent or officer of Office 6/10.

3. Personal Jurisdiction

Although the Court is not convinced that Jiang properly could be served in an agency capacity on behalf of Office 6/10, we nevertheless consider the next question in the analysis: assuming Jiang was an agent of Office 6/10, was service on him effective to establish the Court's personal jurisdiction over the Office?

Plaintiffs suggest that personal jurisdiction exists pursuant to Federal Rule of Civil Procedure 4(k)(2). Rule 4(k)(2) provides that, with respect to claims arising under federal law, "[i]f the exercise of jurisdiction is consistent with the Constitution and laws of the United States," service of summons is effective "to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state." According to the Advisory Committee notes following the Rule, this provision was intended to allow for jurisdiction over a nonresident of the United States whose contacts with the United States are "sufficient to justify the application of United States law . . . but [that has] insufficient contact with

any single state to support jurisdiction under state long-arm legislation or meet the requirements of the Fourteenth Amendment limitation on state court territorial jurisdiction." Fed. R. Civ. P. 4(k)(2), 1993 Advisory Committee Notes. For personal jurisdiction to be achieved under this Rule, the defendant must have "affiliating contacts with the United States sufficient to justify the exercise of personal jurisdiction over that party," and must not be subject to personal jurisdiction in any state. *Id.* Although plaintiffs seem to claim that they may benefit from this Rule, *see* Pls.' Mem. at 45 n.29, they also, inconsistently, maintain that Jiang is subject to the jurisdiction not only of Illinois, but of other states as well, *id.* at 44. Plaintiffs thus have failed to show, as required by Rule 4(k)(2), that Office 6/10 is not amenable to suit in any state.

Federal Rule of Civil Procedure 4(k)(1)(A) provides that service of a summons establishes personal jurisdiction over a defendant if the defendant "could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Under Illinois law, personal jurisdiction exists based on certain enumerated bases, as well as "any other basis" permitted under the Illinois and United States Constitutions. 735 ILCS 5/2-209(c). Because Illinois courts have not elucidated any "operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction," the two constitutional analyses collapse into one. *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 715 (7th Cir. 2002).

Appendix C

Federal due process permits personal jurisdiction over a nonresident defendant when it has had "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). What is meant by "minimum contacts" depends on whether general or specific jurisdiction is asserted. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997). General jurisdiction is permitted only when a defendant has "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984). Specific jurisdiction exists when the cause of action "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Id.* at 414 n.8. Plaintiffs claim that both specific and general jurisdiction are available. Pls.' Mem. at 43-45.

In considering whether general jurisdiction exists, we must determine whether Office 6/10's contacts with Illinois are "continuous and systematic." *Helicopteros*, 466 U.S. at 416. The exercise of general jurisdiction is a significant assertion of a court's power because it "allows a defendant to be sued in that state regardless of the subject matter of the lawsuit." *Logan Productions, Inc. v. Optibase, Inc.*, 103 F.3d 49, 52 (7th Cir. 1996). Therefore "the constitutional requirement for general jurisdiction is 'considerably more stringent' than that required for specific jurisdiction." *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (quoting *United States v. Swiss American Bank, Ltd.*, 274 F.3d 610, 618 (1st Cir. 2001)); *see also Int'l Shoe*, 326 U.S. at 318 (indicating that a court can assert

general jurisdiction over a corporate defendant only when "continuous corporate activity within a state [is] thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities"). The Seventh Circuit has stated that contacts, to be considered "continuous and systematic,"

> must be so extensive to be tantamount to [the defendant's] being constructively present in the state to such a degree that it would be fundamentally fair to require it to answer in an [Illinois] court in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world.

Purdue, 338 F.3d at 787 (emphasis in original); *see also Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000), *cited in Purdue*, 338 F.3d at 787 n.16 (general jurisdiction "requires that the defendant's contacts be of the sort that approximate physical presence").

Office 6/10's alleged contacts with Illinois cited by plaintiffs are the following: (1) the creation of a "blacklist" of Falun Gong supporters on which seven Illinois residents appear—plaintiffs allege that "the government of China" has used the list to pressure airlines to deny passage to anyone appearing on the list seeking to travel to sites visited by Jiang, Pls.' Mem. at 44; (2) the persecution, detention, and torture in China of "at least six individuals who have since become residents of Illinois," *id.;* and (3) activities aimed at monitoring and suppressing Falun Gong demonstrations within Illinois, such as assaults on demonstrators,

intimidation of Chicago hotels in order to prevent their hosting of Falun Gong activities, and the destruction of leaflets and signs at Falun Gong demonstrations.

Office 6/10's alleged creation of a blacklist on which the names of seven Illinois residents happen to appear does not constitute a contact with Illinois. The list evidently was created in China, and as best as we can tell, without regard to the residency of the persons named. The persecution, torture, and detention in China of individuals who later became Illinois residents is likewise not a contact by Office 6/10 with Illinois. The alleged atrocities occurred in China; the fact that the victims later became Illinois residents is insufficient to confer jurisdiction. *Purdue*, 338 F.3d at 780 ("[I]t must be the activity of the defendant that makes it amenable to jurisdiction, not the unilateral activity of the plaintiff or some other entity."); *cf. Helicopteros*, 466 U.S. at 417 (suggesting that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction"); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

Office 6/10's alleged attempts to suppress Falun Gong demonstrations in Illinois through the assault of demonstrators, intimidation of Chicago hotels, and the destruction of leaflets and signs are, obviously, contacts with Illinois. But although these contacts may have occurred on more than one occasion, they do not rise to the level of

"continuous and systematic" contacts, such that Office 6/10 "could reasonably foresee being haled into court in [Illinois] for *any* matter," *Purdue*, 338 F.3d at 787 (emphasis added), even a case unrelated to those contacts. Nor do they equate to the constructive presence of Office 6/10 in Illinois. *Id.* Although such activities may potentially confer specific jurisdiction for claims arising from those activities, they do not justify the assertion of general jurisdiction.

We next consider the availability of specific jurisdiction. As stated above, for specific jurisdiction to exist, the plaintiffs' claims must arise from the defendant's contacts with the forum. In this case they do not. As we stated above, the only activity by Office 6/10 amounting to a contact with Illinois is its alleged acts related to Falun Gong demonstrations in Illinois. None of plaintiffs' claims, however, arise from these activities. Plaintiffs A, B, C, D, E, and F's claims arise from atrocities allegedly inflicted on them in China.[6] Plaintiffs Wei Ye and Hao Wang's claims are related to their appearance on the blacklist. Although the appearance of Wei Ye, an Illinois resident, on the alleged blacklist does not amount to a contact by Office 6/10 with Illinois, a few things are nevertheless worth mentioning. Plaintiffs state that it was the Chinese government, not Office 6/10, that used the blacklist to pressure airlines into denying passage to persons named on it. Pls.' Mem. at 44. According to the complaint, at the behest of the Chinese government, Iceland's Ministry of Justice directed Icelandair to deny

6. Moreover, there is no indication that the six current Illinois residents that were detained and tortured in China are plaintiffs in this case. In fact, the complaint does not suggest that plaintiffs A, B, C, D, E, or F are Illinois residents. *See* Compl. ¶¶ 13-18.

passage to Mr. Ye. Compl ¶¶ 21, 45. But he traveled to Minnesota to board the Icelandair flight; it was in that state, not Illinois, where he was prevented from boarding. It therefore appears that any contact initiated by the Chinese government in this regard was with Iceland, not Illinois, and had an effect in Minnesota, not Illinois. Plaintiff Hao Wang was not prevented from boarding his flight, which originated in Boston. Rather, he was detained by Icelandic officials after his arrival in that country. Compl. ¶ 22.

Based on the foregoing, even if Jiang was an agent or officer of Office 6/10 and thus capable of receiving service on its behalf, such service was insufficient to confer personal jurisdiction over Office 6/10 because the Office is not subject to the jurisdiction of Illinois courts. *See* Fed. R. Civ. P. 4(k)(1)(a). Because the Court lacks personal jurisdiction over the Falun Gong Control Office, we dismiss the claims against it.

Although the Court dismisses the claims against Office 6/10 on the basis of lack of personal jurisdiction, there is a significant possibility that the Foreign Sovereign Immunities Act applies to the claims against this entity. The FSIA provides that, subject to certain exceptions, foreign states and their agencies and instrumentalities are immune from suit in United States courts. 28 U.S.C. §§ 1603-05. Plaintiffs maintain that the Falun Gong Control Office is a subdivision of China's Communist Party and as such is a private entity. *See*, *e.g.*, Pls.' Mem. at 42; Aff. of Andrew Nathan ¶ 7. Although they claim that "[a]t no time during its operation was Office 6/10 considered a government entity," plaintiffs acknowledge that "as a practical and functional matter [the

Falun Gong Control Office] played a major role in controlling and supervising the activities of a number of governmental agencies involved in law enforcement, judicial and propaganda dissemination activities." Pls.' Mem. at 42; *see also* Aff. of Andrew Nathan ¶ 3 (noting that the Chinese Communist Party and Chinese government are "constitutionally and organizationally distinct" while conceding that "the Communist Party continues to control Chinese politics and government"). They state that the Office "acts under color of law and carries out law enforcement operations of a governmental nature." Compl. ¶ 7. Because of Office 6/10's practical role in both supervising and mandating the actions of government actors and because of the intimate link between the government and the ruling party in China, a significant question exists as to whether the Falun Gong Control Office is an "agency or instrumentality" of the Chinese state. If so, it would be entitled to sovereign immunity under the FSIA, and the Court would lack subject matter jurisdiction over the claims against it. *See Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) ("[T]he absence of sovereign immunity is a prerequisite to subject matter jurisdiction."). In light of the Court's determination that personal jurisdiction over Office 6/10 is lacking, however, we need not address this issue. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999) (court may dismiss case for lack of personal jurisdiction before considering issue of subject matter jurisdiction).

Appendix C

CONCLUSION

For the reasons stated above, the Court recognizes defendant Jiang Zemin's head-of-state immunity and dismisses the claims against him. The Court also dismisses the claims against defendant Falun Gong Control Office for lack of personal jurisdiction. The Clerk is directed to enter judgment dismissing the plaintiffs' claims. All pending motions [Nos. 3-1, 11-1, 11- 2, 18-1, 18-2] are terminated.

s/ Matthew F. Kennelly
MATTHEW F. KENNELLY
United States District Judge

Date: September 12, 2003